93-179

No._____

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IN THE

Supreme Court of the United States

October Term, 1993

GRACE COMMUNITY CHURCH,
Petitioner,

v.

TOWN OF BETHEL AND BETHEL PLANNING AND ZONING COMMISSION OF THE TOWN OF BETHEL,
Respondents.

PETITION FOR WRIT OF CERTIORARI

JOHN W. MAUCK
Counsel of Record
MAUCK, BELLANDE, BAKER & O'CONNELL
19 South LaSalle Street
Suite 1203
Chicago, IL 60603
(312) 782-8188

JAMES MANNION
JEROME MEYER
DRISCOLL, LANE, MANNION & DRISCOLL
235 Greenwood Avenue
Bethel, CT 06801
(203) 744-5000

Attorneys for Petitioner

QUESTIONS PRESENTED

A municipality forbids religious groups freely to locate anywhere in the municipality, but does allow them in certain zones if they first obtain a zoning "special permit" which is issued only in the discretion of town officials after public hearing. Other assembly uses such as clubs, lodges, public recreation facilities, fraternal organizations, billiard parlors, funeral homes and theaters are freely allowed in several zones of the town without such precondition.

1. Where the inability to obtain a permanent house of worship infringes upon most activities of a congregation and is caused solely by zoning provisions, are those provisions subject to strict scrutiny under Free Exercise, Free Speech, Free Assembly, or Freedom of Association provisions of the First Amendment?

2. Can a municipality exclude a religious group from locating anywhere within its borders unless that group has first obtained a "special permit", even though this court has ruled that live-nude dancing cannot be so excluded under free speech provisions of the First Amendment?

3. Does the less stringent regulation of secular assemblies violate the Equal Protection Clause?

4. Can municipal authorities use subjective and discretionary zoning laws to select which persons can assemble, worship or speak within the municipality?

PARTIES

The name of all of the parties to the proceeding in the court below appear in the caption of the case.*

* Petitioner, Grace Community Church, is a not-for-profit corporation. It has no parent company or subsidiaries.

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CONSTITUTIONAL PROVISIONS:

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Bethel Zoning Ordinance — 4, passim and in full as lodged with clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. _____

Grace Community Church,
Petitioner,

v.

Town of Bethel and Bethel Planning
and Zoning Commission of the Town of Bethel,

Respondents.

Petition For Writ of Certiorari To The Connecticut Court of Appeals

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DECISIONS BELOW

The decision of the Connecticut Court of Appeals is reported as Grace Community Church v. Town of Bethel, et al., 30 Conn. App. 765 (1993) and is reprinted in Appendix A. The decisions of the Connecticut Superior Court after trial, and after motion to reconsider are unreported, but are reprinted in Appendix C.

JURISDICTION

The Connecticut Court of Appeals for the Second Circuit entered its judgment in this case on March 30, 1993. The Connecticut Supreme Court denied certification to appeal on May 17, 1993. This Court has jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend.I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

The Town of Bethel, Connecticut's Zoning Ordinance is set forth as Petitioner's Lodging with the Clerk of Court with partial citation on p. 4.

STATEMENT OF THE CASE

At issue is whether a town has the right to exclude and license religious assembly and speech through land use controls, and to do so in ways more stringent that secular assembly and speech are controlled.

Respondent, Town of Bethel, does not allow churches in any zone within the community as a matter of right, but only in certain zones if a church has first obtained a license to operate at a specific location in the form of a special use zoning permit which is voted by the Planning & Zoning Commission in its discretion only after public hearing. In this action, Petitioner seeks declaration of the facial invalidity of aspects of the zoning ordinance and injunctive relief. Petitioner further seeks remand for a trial on damages incurred because unconstitutional aspects of the ordinance severely restricted its ability to construct a house of worship and made the process of doing so very expensive.

A. Statement of Facts

Grace Community Church (hereinafter referred to as "Grace") is an eleven year old congregation which has been meeting in a high school near Bethel since 1985. More of its members live in Bethel than in any other town. In its search to locate a place to build a permanent meeting facility, Grace used the efforts of many members, as well as two realtors and looked at many sites, including one in a commercial area of Bethel where a special permit was required. Since 1988, Grace has been ready, willing and able to purchase a 13-acre site which it located in a residential zone in Bethel and to construct a house of worship on that site. Churches are not allowed as a permitted use in any zone in the Town of Bethel, and are only allowed in the residential zone and

certain other zones by special permit.[1] In the zone where Grace ultimately bought land, public recreation facilities are freely permitted but churches and private community centers must have a permit. Private community centers, lodges, billiard parlors, theaters, fraternal organizations, funeral parlors and clubs are freely allowed in some zones, but churches are not freely allowed anywhere. The special use process is allowed to take up to 130 days (over four months), for approval or disapproval. At worst, when litigation must be resorted to, ultimate approval can take five years, as in this case. Because of the zoning requirements for "special permission" Grace first paid $24,000 for an option on the 13-acre parcel, followed by many months and expense of extra engineering preparation costing $143,000, while seeking the permit from the Planning Commission, but with no way to know surely whether it would be given "special permission". Then it spent another $11,400 to extend the option. Although Grace was initially granted a permit by a 4-1 vote, neighbors who did not want the church near them intervened and appealed, protesting that a request of the Commission for additional information after the hearing was improper. Because of the ensuing judicial delay, when it could no longer extend the option, Grace had to spend $450,000 to buy the property to avoid losing it. The Connecticut

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[1] §118-21 of the Bethel Ordinance provides:

H. Notwithstanding any other provision of this regulation, no special permit shall be approved unless the Planning and Zoning Commission shall have found that:

(1) The proposed use will have no detrimental effect on present and future dwellings in the vicinity.

(2) The proposed architecture, site plan and landscaping are in harmony with the character of the neighborhood.

(3) No conditions will be created which will adversely affect traffic.

Superior Court overruled the grant of the permit by the Commission due to its procedural error and Grace started over. In 1990, Grace reapplied for a permit identical to the one previously approved, and was denied by a 3-2 vote. Grace then filed an administrative appeal in the Superior Court and, while that suit was pending, and because of Connecticut procedure[2] filed this action for a declaratory judgment, injunctive relief and damages under §1983, alleging that the ordinance is facially unconstitutional. The two suits were consolidated. In the administrative appeal, the Superior Court ordered Bethel to grant the special permit. Because Bethel did not appeal, the issue of "special permission" to build is decided until Grace needs to request modification in the terms of its initial special permit license, decides to expand or fails to complete construction within the time limits of the permit. If Grace needs to modify its building plans by adding, for example, an extra classroom, it must start over again in seeking a new special permit. In this facial challenge, Grace and Bethel agreed to a 17-page stipulation detailing how the lack of a permanent facility burdened and infringed upon the speech, assembly, religious and associational activities of the congregation (problems of moving in and out every Sunday, severe limitations on children's ministries, loss of members, loss of a pastor, loss of income, hindrance to worship, preaching and social activities, restriction of vacation Bible school, etc.). Included in the stipulation are expenses in excess of $700,000 (including increased construction costs of $419,800, and engineering expenses of $143,000 attributable solely to the special use proceedings) which the church would not have incurred but for the unconstitutional aspects of the Ordinance. The full stipulation is at Appendix D. A two day trial with seven witnesses detailed further, and without contradiction how the inability to acquire a permanent meeting facility adversely affected the worship, educational, athletic, and social activities of children, teenagers, and adults, and how the services of the choir,

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[2] Connecticut does not allow a party who makes an application under a zoning ordinance to challenge the constitutionality of that ordinance in the same proceeding.

musicians, artists, administrators, teachers, ushers, and pastors were stymied, prohibited or made more costly. An expert testified that special permitting put Grace at a "competitive disadvantage" in acquiring land.

B. Proceedings Below

After trial and presentation of the 17-page stipulation, all relief was denied because the trial court found no "deprivation of a federal right." (App.C-14) The Appellate Court, (App.A-7, 10), also ruled that no federal constitutional rights were abridged by any aspect of the Ordinance and denied the Church's requested remand to the trial court for proof of damages. The declaratory and injunctive relief were held to be moot. The free exercise and freedom of assembly challenges to the ordinance were rejected based upon a 1962 Connecticut Supreme Court case which allowed a community to require a special permit for a parochial school in a zone where public schools needed no permission to locate.[3] (App.A-8)

The free speech challenge was rejected because the ordinance "allows reasonable alternative avenue of communication" (App.A-9) but the court did not say what those avenues where. The free speech challenge was also rejected because the ordinance was "content neutral" in that it contained no reference to plaintiff's religious practices (App.A-9) and because some secular assembly uses must also obtain special permits in residential zones (App.A-9). (The court did not discuss that those and other secular uses are freely allowed in other zones, but churches are nowhere freely allowed.)

On the question of whether a town can constitutionally exclude all new religious groups by requiring special permission or exclusion from every zone in the city, the Appellate Court gave no opinion.

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[3] *St. John's Roman Catholic Church Corporation v. Darien*, 149 Conn. 712, 184 A2d 42 (1962).

On the question of whether the special use restrictions of the Ordinance were unduly discretionary as applied to a use involving free speech, assembly, exercise and association, the Appellate Court ruled that the special permit process was needed to deal with parking and traffic problems. (App.A-9)

On the question whether the more favorable treatment of all non-religious assembly uses violated the equal protection clause, the Appellate Court did not consider the ordinance as a whole, ruling that the holding of the *St. John's* case, *supra,* allowing a municipality to require a special permit for a parochial school, when public schools were freely permitted, controlled the equal protection argument as to a residential zone. (App.A-10).

The Connecticut Supreme Court denied review on May 17, 1993.

REASONS FOR GRANTING THE WRIT

In the past score of years Federal Appellate Courts and state Supreme and Appellate Courts have decided numerous cases involving the interrelation of zoning laws and the rights of religious groups to speak, worship and assemble. These decisions constitute a virtual legal anarchy which exists primarily **because the U.S. Supreme Court has never decided a zoning case affecting synagogues, churches or mosques.** Almost every town, city and county in America has a zoning ordinance and most Americans gather in buildings either regularly to worship or at significant times such as holidays, weddings and funerals. Yet, despite religious practice and zoning being touchstones of American experience, the lower courts and the bar have a better understanding of how ritual use of peyote and animal sacrifices can be regulated, than they do how the towns can zone religious meeting halls.

Chaos among the circuits and state appellate courts, and

conflicts with existing Supreme Court decisions exists in **each** of the constitutional questions presented in this case.

1. Do zoning laws infringing upon the ability to acquire a facility for worship on a permanent basis require "strict scrutiny" under the Free Exercise, Freedom of Assembly, Freedom of Speech or Freedom of Association protections of the First Amendment?

The Fifth[4] and Eighth[5] Circuits and Appellate Courts in Indiana[6] and Illinois[7] have answered affirmatively. The Eighth Circuit, with unusual judicial candor appears to be asking for help from above:"...we express a lingering doubt as to whether the time, place and manner doctrine applies."[8] In contract, the

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[4] *Islamic Center of Miss. v. Starkville, Miss.*, 840 F.2d 293 (5th Cir. 1988). "By making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation, the City burdens their exercise of religion." (at p. 299)

[5] *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 469 (Eighth Cir. 1991).

[6] *Church of Christ v. Metropolitan Bd. of Zoning*, 371 N.E. 2d 1331, 175 Ind.App. 346 (1978). "The exclusion [absent a "variance" issued by the city] of a Church from a residential area by a zoning ordinance is a violation of the first and fourteenth amendments to the U.S. Constitution..." (at 1333-4)

[7] *Lubavitch Chabad House v. City of Evanston*, 343 112 Ill. App.3d 223, 445 N.E.2d 343, (1983), *cert. den.* 464 U.S. 992, 104 S.Ct. 485, 78 L.Ed. 2d 681 (1983). The "strick scrutiny" formulation, per se, is not found in Illinois opinions, but they have a reasonable facsimile:

> "Evanston's refusal to grant plaintiff's petition for a special use permit prevents plaintiff from the free practice of religion at this particular location, and so serves, in some degree, to limit the free exercise of religion...first amendment rights and freedoms far outweigh considerations of public inconvenience, annoyance or unrest." (p.227)

[8] *Cornerstone supra.* at 469.

Sixth[9], Ninth[10], Tenth[11] and Eleventh[12] Circuits, as well as the Connecticut Appellate Court in this case (and arguably the Seventh Circuit, see Footnote 15) have answered the question in the negative, or say that the acquisition of a permanent meeting place was not sufficiently important to the practices of a **particular** religious group to merit protection. Thus, in some

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[9] *Lakewood Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio,* 699 F.2d 303 (6th Cir. 1983). U.S. cert. denied, 464 U.S. 815 (1983). "However, building and owning a church is a desirable accessory to worship, not a fundamental tenet of the Congregation's religious beliefs. The zoning ordinance does not prevent the congregation from practicing its faith through worship, whether the worship be in homes, schools, other churches or meeting halls throughout the city." (p.307)

[10] *Christian Gospel Church, Inc. v. City and County of San Francisco,* 896 F.2d 1221 (9th Cir. 1990), cert. den. 498 U.S. 999, 111 S.Ct. 559, 112 L.Ed. 2d 565, (1990)"...the church had, until applying for this permit, worshipped in the banquet room of a hotel. It is difficult for us to find a significant burden on religious practice... The burdens imposed by this action are therefore of convenience and expense...[and] minimal." (p.1224) (The reader is here requested to read the "Stipulation" Appendix D to appreciate the burdens imposed upon the religious sojourner).

[11] *Messiah Baptist Church v. County of Jefferson, State of Colorado,* 859 F.2d 820 (10th Cir. 1988) cert. den., 490 U.S. 1005, 109 S.Ct. 1638, 104 L.E.2d 154 (1989) "building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs" at p. 825 quoting *Lakewood, supra.*

[12] *Grosz v. City of Miami Beach, Florida,* 721 F.2d 729 (11th Cir. 1983) U.S. cert. denied 469 U.S. 827 (1984). "We cannot know the exact impact upon appellees, in terms of convenience, dollars or aesthetics, that a location change would entail. The burden imposed, though, plainly does not rise to the level of criminal liability, loss of livelihood, or denial of a basic income sustaining public welfare benefit." (at p. 739) The "balancing" test in *Grosz* and cases relying upon it are due for review in light of this court's apparent rejection of its use in *Church of Lukumi Babalu Aye v. Hialeah,* No. 91-948, June 11, 1993, at p.7.

areas of the country the ability to establish a church in a community is protected by the heightened scrutiny of the First Amendment, while in others it is not. Both the Tenth and Eleventh Circuits have also beseeched the Supreme Court to answer the questions church zoning cases raise. The Tenth Circuit in *Messiah Baptist* quotes the Eleventh Circuit in *Grosz*:

"[I]nterpretation and application of the free exercise clause has created, within the field of constitutional doctrine, areas dotted by unanswered questions." (859 F.2d at 824)

Even more amazing than the utter tohubohu regarding the law of zoning and religious uses across the country is that "live nude dancing" and "adult movie theaters" can not be zoned out of a community[13] anywhere in the U.S. absent a strictly scrutinized, compelling state interest, while churches in many areas have no Federal protection whatsoever. Is this the Constitution envisioned by the Founders where the right to exhibit nude women to the paying public is protected, but the right to assemble for private worship is not? The current perversion of common and constitutional sense exists because many lower courts do not see the inability to obtain a permanent meeting place as infringing upon **exercise** of religion, speech, association or assembly, while the ability to have buildings in which to dance nude or watch nude dancing or show adult movies is never even questioned as being integral to those rights! Vice is protected, virtue must fend for itself unless the Supreme Court grants review.

2. Can a municipality exclude a religious group from locating in any zone within its borders unless that group has first obtained a "special pemit?"

Three long-established state court decisions had settled the law

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[13] *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2671 (1981), and *Playtime Theaters v. City of Renton*, 475 U.S. 41 106 S.Ct. 925, 89 L.E.2d 29, rehearing denied, 475 U.S. 1132, 106 S. Ct. 1663, 90 L.Ed. 205 (1986).

that such an ordinance was invalid[14]. However, in 1987 the Seventh Circuit[15] held that a small Afro-American congregation which wanted to rent a facility in Evanston, Illinois, lacked standing to challenge an ordinance which did not allow churches anywhere except by "special permit." Until the decision below, no American Court had ever upheld an ordinance which did not allow a church as a permitted use somewhere in the community. The Connecticut Court of Appeals did not discuss the challenge to the total exclusion of churches except by permit, and did not say why it failed to do so. Thus, a law that singles out all religious groups for exclusion may still be technically illegal but apparently can avoid review. This Court's recent decision in *Lukumi, supra.* Note 12, sharply rejects laws which regulate religion, but are not neutral and generally applicable. The Bethel Ordinance is neither. Review should be granted because the decision below, conflicts with *Lukumi,* and with *Employment Division Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990). The lower courts cannot sit on two legged chairs. The Connecticut Court of Appeals apparently saw no applicability of *Smith* or could not understand *Smith* because, despite the urging of Petitioner that *Smith* was relevant, no mention of it is made.

3. Does the less stringent regulation of non-religious assemblies violate the Equal Protection Clause?

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[14] *Congregational Temple Israel v. City of Creve Coeur,* 320 S.W. 2d 451, 546-7 (Mo. Sup. Ct. 1959); *North Shore Unitarian v. Plandome,* 200 Misc. 524, 109 N.Y.S. 2d 803 (1951); *Mooney v. Orchard Lake,* 333 Mich. 389, 53 N.W. 2d 308 (Mich. Sup. Ct. 1952).

[15] *Love Church v. City of Evanston,* 896 F.2d 1082 (7th Cir. 1990) cert. denied, 498 U.S. 898, 111 S.Ct. 252, 112 L.E.2d 210, (1990): "...Love Church offers the affidavit of Pastor Gill stating that on four occasions suitable rental properties were unavailable solely due to the technical requirements of the special use permit... Even accepting Pastor Gill's allegations as true, as we must, they simply do not demonstrate a distinct and palpable injury for purposes of establishing standing." (at p.1085)

This Court's decisions in *Cleburne*[16], *Lamb's Chapel*[17], *Widmar*[18] and *Lukumi*, are inapparent conflict with the holding in this case. In the zoning context, *Cleburne* held that there was not even a rational basis for excluding housing for the *feeble-minded* from zones where several multi-family housing uses were allowed! While in the religious context *Lamb's Chapel, Widmar*, and *Lukumi*, have held that religious speech and practices with religious significance are entitled to the same protection as non-religious speech and similar practices without religious significance. These Supreme Court decisions apply to the principle in this case that if secular assembly uses are allowed in a town, then religious assembly uses must be allowed absent a content neutral, narrowly tailored exception to meet a compelling governmental interest.

However, until the Supreme Court introduces these equal protection land use and equal protection assembly/speech contexts to each other, true love may never be found. Consider how four lower courts have rejected equal protection as applying to discrimination between religious assembly and non-religious assembly. First, in this case, the Court of Appeals, (App.A-10), ignored *Widmar* and distinguished *Cleburne*, relying upon a 1962 Connecticut Supreme Court case[19], which held that a parochial school could be excluded from a zone where public schools were permitted.

Second, the Eighth Circuit[20] in a case where churches were not allowed in a zone where American Legion, VFW Halls, hotels,

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[16] *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L.Ed.2d 313, 105 S.Ct. 3249 (1985).

[17] *Lamb's Chapel v. Center Moriches Union Free School District*, ...U.S. ... (1993).

[18] *Widmar v. Vincent*, 454 U.S. 263 (1981).

[19] *St. John's, supra.*

[20] *Cornerstone supra.* at 472.

Masonic Lodges, and theaters were allowed, did seek to apply *Cleburne* in its equal protection analysis, and reversed the summary judgment entered by the District Court against the church, p.472, but without entering judgment in favor of the church!

Third, the Seventh Circuit[21] ruled that a congregation which alleged that because of the special permit requirement it was unable to lease any property in Evanston, Illinois, was without standing to present an equal protection claim, even though Evanston allowed community centers, theaters, clubs, funeral parlors, recreation buildings and hotels, without a permit!

Fourth, the Ninth Circuit[22] held that denial of a special use permit for a church which desired to conduct "home worship" in a residential area did not violate equal protection freedoms. In that case great weight was given to a petition opposing the church which had been circulated among neighbors. The court stated: "neighborhood opposition to the granting of a conditional permit is not unlawful and should be considered by the Planning Commission." Thus, the freedom of many Americans to assemble for worship is a function of what the neighbors want, and not a function of the treatment afforded secular assembly uses.

4. Do the provisions under which special permission is awarded confer unconstitutional discretion upon municipal authorities to select which persons can assemble, worship, or speak within the municipality?

The "special permission" process for churches used in Bethel and throughout America is **licensing** with all of its inherent evils (religious, racial, socio-economic, or political discrimination; arbitrariness; prior restraint; content based permission to speak), **licensing** imposed by neighbors elected by neighbors whose views

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[21] *Love Church supra,* see note 15.

[22] *Christian Gospel supra.* at 122.

of "neighborhood purity" may not coincide with the constitutional values of tolerance, freedom and diversity. The provisions of the Bethel Ordinance (see note1) are patently and probably deliberately vague to give the Zoning Commission maximum power and discretion. This Court has recognized the risks of discretionary licensing and repeatedly struck down laws which do not have objective standards.[23] The decision below does not follow those rulings because while it considers the governmental justifications for controls, it neither adopts a standard of review, nor considers the burdens those controls put on freedom of speech, religion, assembly or association.

Conclusion

Vitriolic battles are being fought throughout our land because communities under the cover of zoning regulation have assumed the right, in ignorance, in disregard of the constitution, or due to political convenience, to license which groups can locate in their town. Grace Community Church found "no room at the Inn". Other unwilling participants in this struggle are largely individual congregations of disempowered people (Muslims; Christian or Jewish sects; the poor; house groups; Jehovah's Witnesses; Afro Americans)[24] or any group the neighbors might fear or desire to "cleanse" from the neighborhood because they "ordain gays", "worship in Spanish", or present Jesus as a radical. Many of these groups cannot afford even apply for "special permission" much less petition the Supreme Court. Because of laws which repress,

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[23] E.g. *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750, 759 (1988) "...without standards to fetter the licensor's discretion, the difficulties of proof and the case-by-case nature of 'as applied' challenges render the licensor's action in large measure effectively unreviewable."

[24] Our review of the case law in the last twenty years found no reported zoning decisions regarding the "established" churches, such as Presbyterians, Catholics, Methodists, or Episcopalians.

courts which are confused and neighborhood votes which turn freedoms into political footballs, the believers of Grace Community Church, and believers across the U.S. are subject to religious, racial and or social intolerance and exclusion. When religious congregations are forced to undergo the special use gauntlet and realize that secular assemblies and live nude dancing clubs are not, suspicions of the legal system can easily turn to disdain. Fourteen lower courts have displayed a full spectrum of rulings, and three Federal Circuits have urged the Supreme Court to set rules of conduct to replace guerilla warfare. While the Supreme Court has been denying review, vandals of confusion have spray painted bad law on the American House of Worship. This case and time is ripe for Supreme Court review. The people of Grace Community Church have been badly damaged. Hear their petition.

Respectfully submitted,
John W. Mauck,
Counsel of Record

John W. Mauck
Mauck, Bellande, Baker & O'Connell
19 South LaSalle, Suite 1203
Chicago, IL 60603
(312) 782-8188

James Mannion/Jerome Meyer
Driscoll, Lane, Mannion & Driscoll
235 Greenwood Avenue
Bethel, CT 06801
(203) 744-5000

GRACE COMMUNITY CHURCH v. TOWN OF BETHEL ET AL.
(11812)

DUPONT, C. J., LAVERY and SCHALLER, JR.

The plaintiff church appealed to this court from the judgment of the trial court rejecting its claims that certain of the zoning regulations of the defendant town of Bethel are unconstitutional in that churches are allowed in residential neighborhoods only by special permit. *Held:*

1. *The trial court properly rejected the plaintiff's claim for injunctive and declaratory relief; the plantiff having been issued a special permit, its claim for that relief was moot.*
2. *The trial court properly determined that the special permit regulation did not violate the plaintiff's first amendment rights or its right to equal protection; The special permit process is a reasonable response to potential planning problems associated with a church in a residential heighborhood and is based on a rational distinction between such minimally intrusive uses as one family dwellings and potentially more burdensome land uses such as churches.*

Argued January 13—decision released March 30, 1993

Action for a judgement declaring certain of the defendants' zoning regulations to be unconstitutional, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Fuller, J.;* judgment for the defendants, from which the plaintiff appealed to this court, *Affirmed.*

John W. Mauck, pro hac vice, with whom were *Jerome A. Mayer* and *James M. Mannion,* for the appellant (plaintiff).

Stephen C. Gallagher, for the appellees (defendants).

Schaller, J. The plaintiff appeals from the judgment of the trial court rejecting its claim that certain of Bethel zoning regulations are unconstitutional. The plaintiff claims that the regulations

abridged its rights under the first and fourteenth amendments to the United States constitution, and therefore, the trial court improperly denied (1) injunctive and declaratory relief, and (2) damages pursuant to 42 U.S.C. § 1983. We affirm the judgment of the trial court.

The following facts are not in dispute. The plaintiff, Grace Community Church, was founded in 1982. Initially, the members of the church congregated at various locations, not having a permanent facility of their own. They searched for a suitable location to build a church, primarily in the greater Danbury area. In 1985, the plaintiff entered into negotiations to purchase real property at the intersection of Weed and Walnut Hill Roads in the town of Bethel. This property was located in an R-40 residential zone. Pursuant to the regulations, the property was zoned to permit single family residences. Bethel Zoning Regs. § 118-24 A.[1] Other uses including churches, clubs and com-

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[1]Section 118-24 A of the Bethel zoning regulations provides in pertinent part: "Permitted Uses. No land (in an R-40 zone) shall be used or occupied and no structure shall be designed, erected, altered, used or occupied except for only one (1) of the following permitted uses . . .

(1) One-family dwelling, one (1) per lot.

(2) Home business, home office or professional office . . .

(3) A customary incidental home occupation . . .

(4) Community recreation facility, not including an amusement park or privately owned facility.

(5) Farming, dairy, truck or nursery gardening . . .

(6) Library, public.

(7) Public park and public playground or public recreational facility operated by a governmental unit . . .

(8) Public telephone.

(9) A single quest cottage . . .

(10) Tag sale (with permit once every calendar year) . . .

(11) Water reservoir.

(12) Family day-care home."

unity centers were allowed only by special permit. Bethel Zoning Regs. § 118-24 B.[2]

The plaintiff acquired an option to purchase the property and initiated proceedings to obtain a special permit from the zoning and planning commission. The commission granted the plaintiff a special permit, finding that the proposed use complied with the regulations. Abutting property owners, however, appealed the commission's decision to the Superior Court. During this appeal period, the plaintiff purchased the property pursuant to its option. Subsequently, the court sustained the administrative appeal on the ground that the commission improperly considered evidence offered after the close of the public hearing.

On July 10, 1990, the plaintiff submitted a second application to the commission for a special permit. The commission conducted a public hearing at which neighbors voiced their opposition to the application. The commission thereafter voted to deny

[2] Section 118-24 B of the Bethel zoning regulations provides in pertinent part: "Special permit uses. The following uses are permitted subject to the granting of a special permit by the Planning and Zoning Commission after a public hearing:

(1) A cemetery . . .

(2) Church, parish hall and parish housing, including a covent or other similar residence for clergy.

(3) Club.

(4) Community center building, which shall have no outdoor public address system or any other type of outdoor aimplified music device.

(5) Day-care or nursery school.

(6) Electrical substation. . . .

(7) Fire station.

(8) Gas regulator station. . . .

(10) Home business, home office or professional office as defined under § 118-24 A (2), but employing two (2) or more persons not residing on premises. . . .

(12) A library or museum operated by a nonprofit corporation. . . .

(14) A nursing or convalescent home. . . .

(18) A private golf, tennis or swim club . . . ."

the application, citing the potential for conditions adversely affecting the flow of traffic. See Bethel Zoning Regs. § 118-21 H. The plaintiff appealed the commission's decision to the Superior Court.

The plaintiff also filed a separate action in the Superior Court challenging the consitutionality of the regulations. In this action, the plaintiff sought injunctive and declaratory relief as well as damages pursuant to 42 U.S.C. § 1983. The trial court consolidated these two actions and considered extensive evidence on the matter. On March 17, 1992, the trial court sustained the plaintiff's administrative appeal and ordered the commission to issue the special permit. On April 14, 1992, the commission granted the plaintiff a special permit to build a church on the property at issue.

In a second memorandum of decision, dated July 16, 1992, the trial court found that its disposition of the administrative appeal rendered "academic" further consideration of the plaintiff's claims for injunctive and declaratory relief. The court did, however, consider the plaintiff's claim for damages.[3] On this claim, the court concluded that "[s]ince the plaintiff has not proven a violation of any federal[4] constitutional right or statute,

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[3] The trial court's decision in this regard is unclear. At one point in its memorandum of decision, the court stated that the issue of damages was academic. At another point, the court held that "[t]his issuance of a special permit eliminates any rights the plaintiff may have had under the first count of the complaint for an injunction and similar relief, but does not prevent an action for damages for conduct prior to issuance of the permit." The court went on to state that the plaintiff failed to prove a violation of 42 U.S.C. § 1983. On the basis of the court's action, it is apparent that the court did not treat the claim for damages as a moot issue.

[4] We note that the plaintiff also asserts that the applicable zoning regulations abridged its rights under the state constitution. We decline to review these claims because the plaintiff has not put forth a separate and detailed analysis regarding these issues. *State* v. *Hernandes*, 204 Conn. 377, 394 n.9, 528 A.2d 794 (1987).

there is no basis for a § 1988 action." The court thus denied the plaintiff the relief requested in connection with its challenge to the constitutionality of the regulations. This appeal followed.

I

The plaintiff asserts that the trial court improperly rejected its claim for injunctive and declaratory relief. It posits that the special permit provision of the regulations is unconstitutional and threatens to impede any *future* plans that it might have regarding the expansion of its facility. Because the plaintiff's claim for declaratory relief is based on hypothetical facts, we are without jurisdiction to decide this issue.

"It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Perry* v. *Perry,* 222 Conn. 799, 803, 611 A.2d 400 (1992); *Schallenkamp* v. *DelPonte,* 29 Conn. App. 576, 379, 616 A.2d 1159 (1992). Courts are without jurisdiction to review moot issues, unless the issue presented is " 'capable of repetition, yet evading review,' " *Shays* v. *Local Grievance Committee,* 197 Conn. 566, 573, 499 A.2d 1158 (1985).

"[W]here the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, it may be capable of repetition, yet evading review. . . . In deciding whether to invoke this mitigating principle, we have considered not only the practical difficulties of timely judicial review but also (1) the public importance of the question presented; (2) the potential effect of the ruling on an ongoing program of the state's penal or civil system; and (3) the possibility of a similar effect on the plaintiff himself in the future. . . ." (Citations omitted; internal quotation marks omitted.) *Perry* v. *Perry,* supra.

In this case, the plaintiff's claim for injunctive and declaratory relief clearly is moot. The commission having issued the plaintiff a special permit, the plaintiff is free to build a church on its property in accordance with the approved plans. The plaintiff, therefore, has no present need for relief that would limit the applicability of the allegedly unconstitutional regulations. The regulations no longer stand as an obstacle to the plaintiff's existing plans to build a church. In light of the mootness doctrine, therefore, we have no jurisdiction to consider the plaintiff's claim for injunctive and declaratory relief.

The plaintiff argues that it *may* want to expand its facility at a later date. It appears that the plaintiff is attempting to invoke the "capable of repetition, yet evading review" exception to the mootness doctrine, though its argument is not stated in these precise terms. This exception is unavailing, however, because there is nothing to suggest that litigation involved in obtaining a *second* special permit will expire before the plaintiff could seek appellate review. Further, while the plaintiff's constitutional claims may well be of public importance, this factor alone does not warrant an exception to the mootness doctrine. *Shays* v. *Local Grievance Committee,* supra ("[t]his court has never asserted jurisdiction over a case that would otherwise be moot simply on the ground of the public importance of the question presented"). We conclude that the plaintiff's claim for injunctive and declaratory relief does not fall within the aegis of the "capable of repetition, yet evading review" exception to the mootness doctrine.

II

The plaintiff also asserts that the trial court improperly rejected its claim for damages pursuant to 42 U.S.C. § 1988. In support of this argument, the plaintiff asserts that the special permit process abridged its constitutional rights under the first and fourteenth amendments. We disagree.

We note at the outset that the mootness of the plaintiff's claims for injunctive and declaratory relief does not preclude our review of the claim for damages pursuant to § 1983. In *Hallas* v. *Windsor,* 217 Conn. 689, 692, 587 A.2d 149 (1991), our Supreme Court made abundantly clear that "while cessation of allegedly unconstitutional or illegal activity may render moot a claim for injunctive relief, such cessation will not render moot a case that also states a claim for damages resulting from such activity *prior to* its cessation." (Emphasis added.) Therefore, despite our holding in part I of this decision, we do have jurisdiction to address the plaintiff's claim that the trial court improperly rejected the § 1983 claim. The question is whether the plaintiff's prior efforts to procure a special permit were expended pursuant to unconstitutional zoning regulations thereby giving rise to a § 1983 action for damages.

The plaintiff's success under § 1983 hinges on whether the regulations at issue deprived it of a federal right. *Tedesco* v. *Stamford,* 215 Conn. 450, 456, 576 A.2d 1273 (1990). Specifically, we must consider whether the special permit provision of the regulations violate (1) rights to freedom of religion, association, assembly and expression under the first amendment, (2) rights to equal protection under the fifth amendment, and (3) rights under the takings clause of the fourteenth amendment.

Before turning to these claims individually, we note that it is axiomatic that local governments are constitutionally authorized to regulate land use. *Husti* v. *Zuckerman Property Enterprises, Ltd.,* 199 Conn. 575, 580, 508 A.2d 735, appeal dismissed, 479 U.S. 802, 107 S. Ct. 43, 93 L. Ed. 2d 373 (1986). "[Z]oning restrictions, so far as they reasonably promote public health, safety, and welfare without depriving landowners of all economically viable use of their property, are constitutional even though the effect of the restrictions may be to limit the exercise of private property rights." Id.

A

The plaintiff asserts that the procedures associated with procuring a special permit violated its first amendment right to freedom of religion and assembly. We disagree. Our Supreme Court in *St. John's Roman Catholic Church Corporation* v. *Darien,* 149 Conn 712, 720, 184 A.2d 42 (1962), established that while "churches may not be wholly excluded from residential zones . . . even they may be subject to reasonable regulation regarding their location without violating the constitutional guarantee of freedom of religion." (Citations omitted.) In this case, as in *St. John's,* the issue is whether a zoning regulation is reasonable if it allows churches and related assemblies in a residential neighborhood only upon the issuance of a special permit. We are fully satisfied that this special permit process is a reasonable restriction.

In *Barberino Realty & Development Corporation* v. *Planning & Zoning Commission,* 222 Conn. 607, 612-18, A.2d 1205 (1992), our Supreme Court noted that "[c]ommon specially permitted uses . . . are hospitals, churches and schools in residential zones. These uses are not as intrusive as commercial uses would be, yet they do generate parking and traffic problems that, if not properly planned for, might undermine the residential character of the neighborhood." Accordingly, the special permit operates to ensure that "parking and traffic problems have been satisfactorily worked out . . . ." Id., 618; T. Tondro, Connecticut Land Uses p. 78. Clearly, the special permit process is a reasonable response to the potential planning problems associated with the construction of a church in a residential neighborhood.

The facts of this case exemplify the appropriateness of the regulations at issue. The plaintiff enjoys the support of several hundred people from the greater Danbury community. An obvious purpose of a permanent church facility is to promote religious activities of its congregation. This purpose in turn implicates the safety and welfare of the residential area at issue given the likelihood of increased traffic and the potential for

parking problems. The regulations thus respond appropriately to the possible adverse effects associated with the presence of a church in a residential neighborhood. We conclude that the zoning regulation at issue did not abridge the plaintiff's religious freedoms.

Regarding the plaintiff's claim that the regulations violated its right to free expression, we again are unpersuaded. "When zoning law constricts the realm of permissible expression . . . we employ a heightened level of scrutiny to determine whether the law is valid under the first amendment . . . ." *Husti* v. *Zuckerman Property Enterprises, Ltd.*, supra. "[A] content-neutral zoning regulation that restricts the permissible time, place, and manner of protected speech is constitutional under the first amendment if the regulation 'is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.'" Id., 581, quoting *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986).

In this case, there is no question that the regulations are content neutral. The zoning regulations are free of any reference to the plaintiff's religious practices. Further, the regulations do not isolate churches by themselves as specially permitted uses. Rather, the special permit provision applies to other activities such as clubs, community centers and nursery schools.

The regulations also serve an important governmental interest. "A city has undeniably important interests in protecting the character of its residential neighborhoods and in promoting the health, safety, and welfare of its citizens." *Husti* v. *Zuckerman Property Enterprises, Ltd.*, supra, 581. The regulations at issue serve this important interest by ensuring that traffic and parking problems do not undermine the residential character of the neighborhood. "These are precisely the kinds of dangers that zoning is designed to combat . . . and that justify content-neutral regulation of the time, place, and manner of expression." (Citation omitted.) Id., 582. Moreover, the regulations do *not*

exclude churches from the zone, but rather, require churches, such as the plaintiff, to establish that their plans are generally compatible with residential land uses. We conclude that the regulations did not violate the plaintiff's first amendment rights and that its claims in this regard do not support an action for damages under § 1983.

B

We are also unpersuaded by the claim that the regulations at issue violated the plaintiff's right to equal protection. Our Supreme Court in *St. John's, Roman Catholic Church Corporation* v. *Darien,* supra, addressed a similar challenge to a special permit requirement. There, the regulation required parochial and private schools to obtain a special permit before operating in a residential zone. Id. Public schools, however, were not subject to the same requirement. Noting that the "basic question is whether some natural and substantial difference, germane to the subject and purposes of the regulations, permits the treatment of parochial and private schools as a class distinct from public schools," the court rejected the plaintiff's equal protection challenge to the special permit provision. Id., 722.

Applying the analysis in *St. John's* to the special permit provision at issue, we conclude that the plaintiff's equal protection claim is without merit. Under the Bethel regulations, the permitted use, i.e., one family residences, patently differs from the specially permitted uses, i.e., churches, clubs and day-care facilities. Unlike one family dwellings, the presence of a church, such as the plaintiff with several hundred members, will invariably create the potential for significant traffic and parking problems, and other intrusions. We conclude that the regulations have not abridged the plaintiff's right to equal protections and that damages under § 1983 are unwarranted.

The plaintiff argues that the decision of the United States Supreme Court in *Cleburne* v. *Cleburne Living Center, Inc.*, 473

U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985), militates against the constitutionality of the regulations. We disagree. In *Cleburne*, the court considered the constitutionality of a zoning ordinance that required a special use permit for a facility for the mentally retarded. Numerous other multidwelling facilities, however, were freely permitted in the same zone. Id.[5] The court held that the ordinance violated the equal protection clause. The court decided that the disparate treatment of the mentally retarded was not rationally related to a legitimate government interest because, for all practical purposes, a facility for the mentally retarded would have a similar impact on the zone as the freely permitted uses. Id., 450.

We find the ordinance in *Cleburne* readily distinguishable from the regulations at issue. Unlike the ordinance in *Cleburne*, the Bethel regulations are based on the rational distinction between such minimally intrusive uses as one family dwellings and potentially more burdensome land uses such as churches. In short, through its zoning regulations, the town of Bethel has rationally classified land uses as either permitted, specially permitted or restricted in an effort to preserve the residential character of the R-40 zone.

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[5]For example, the ordinance freely permitted multidwelling facilities, hospitals, apartment houses, apartment hotels, private clubs and philanthropic or eleemosynary institutions, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

C

The plaintiff's final claim is that it is entitled to just compensation because "deprivation of property use from a facially unconstitutional zoning ordinance is a taking under the fifth amendment." The plaintiff has offered little more than a bare assertion that the zoning ordinance implicates the fifth amendment. We therefore decline to review this claim.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

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[6] In any event, we have already stated that the regulations at issue are not constitutionally deficient. Because the plaintiff's just compensation claim is based on the assertion that the regulations are unconstitutional, our previous discussion is dispositive of the claim.

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-92-0472
Grace Community Church

v.

Town of Bethel et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the plantiff for certification to appeal from the Appellate Court (30 Conn. App. 765 [AC 11312],) it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

Alan M. Gannuscio
ASSISTANT CLERK-APPELLATE

Dated: May 17, 1993
Notice sent: 5/17/93
Clerk, Superior Court, Danbury 0306994S
Clerk, Appellate Court
Driscoll, Lane, Mannion & Driscoll
Mauck, Bellande, Baker & O'Connell
Gallagher & Gallagher

Jerome A. Mayer and John W. Mauck, pro hac vice, in support of petition; Stephen C. Gallagher in opposition.

NO. 30 69 94

GRACE COMMUNITY CHURCH SUPERIOR COURT

V. JUDICIAL DISTRICT OF DANBURY

PLANNING & ZONING COMMISSION
OF THE TOWN OF BETHEL, ET AL. MARCH 17, 1992

MEMORANDUM OF DECISION

This is an action for a declaratory judgment and other relief to declare a provision of the Bethel Zoning Regulations unconstitutional. The plaintiff church claims that municipal zoning regulations which prevent churches as a permitted use in any zone of the municipality and allow them only by special permit violate the constitutional rights of the church and its members to the free exercise of religion, that the regulations abridge freedom of religious speech and assembly, and that they violate equal protection under the Fourteenth Amendment.

Declaratory judgments are governed by section 390 of the Connecticut Practice Book. Section 390(c) allows the court to decline to render a declaratory judgment where a court proceeding is available. *Honis v. Cohen,* 18 Conn. App. 80, 84; *Hartford Electric Light Co. v. Water Resources Commission,* 162 Conn. 89, 105; *Cavallaro v. Durham,* 190 Conn. 746. The plaintiff brought a timely appeal from the decision of the Bethel Planning & Zoning Commission denying its application for a special permit. *Grace Community Church v. Planning & Zoning Commission of the Town of Bethel, et al.,* Docket No. CV90-0303616S. In that appeal, tried as a companion case to this action, it was held that the Commission improperly denied the special permit.

The courts of this state resolve constitutional claims only when essential to decide the controversy between the parties. *Adolphson v. Zoning Board of Appeals,* 205 Conn. 703, 720; *Maloney v. Pac,*

183 Conn. 313, 324. As a result of the decision in the administrative appeal, the plaintiff is entitled to a special permit to build a church building on its property on Walnut Hill Road in accordance with a site plan previously approved by the Planning & Zoning Commission. It is unlikely that the Commission will refuse to issue the special permit or that the church will experience any extensive delay in obtaining it. Once the permit is issued and the church is built, the constitutional issues raised in this action become academic. In any event, there is no practical reason to decide them at this time. Section 390(c) of the Connecticut Practice Book.

The plaintiff also requests compensatory damages for alleged deprivation of its constitutional rights under 42 U.S.C., section 1983. The gravamen of that claim is that the refusal of the defendant Commission to issue a special permit to allow construction of a church building on property purchased by the plaintiff in a residential zone violated the plaintiff's rights of religion, speech, assembly and equal protection under the First and Fourteenth Amendments of the U.S. Constitution, and is an unconstitutional taking of property under the Fifth Amendment.

The Commission initially issued a special permit to the plaintiff in 1988 which was set aside on appeal on a procedural ground. While the next application was denied in October 1990, the decision in the administrative appeal resolves the church's right to an approval. In order to recover in a section 1983 action, a plaintiff must show, among other things, deprivation of a federally protected right. *Screws* v. *United States,* 325 U.S. 91, 108. The plaintiff has suggested deferral of this issue. However, the U.S. Supreme Court has stated in the context of a takings claim in a land use case that normal delays in processing land use approvals usually are not temporary takings. *First English Lutheran Evangelical Church* v. *County of Los Angeles,* 482 U.S. 304, 321. The Second Circuit has also recognized problems with a civil rights claim where zoning officials have some discretion in granting an approval, *Yale Auto Parts, Inc.* v. *Johnson,* 758 F.2d

54 (2nd Cir. 1985). A party does not have the right to determine what issues in a case are decided or deferred. The plaintiff did not prove by a preponderance of the evidence a civil rights claim under the existing facts and history of this case to date and that the delays in issuance of the special permit, not all of which have been caused by the Commission, have violated the federal civil rights of the plaintiff. A religious society does not have an absolute right to build a church on demand whenever and wherever it wants.

The declaratory judgment and other relief requested in the complaint are denied without prejudice to the plaintiff's right to request reconsideration of the issues if the special permit is not issued. Jurisdiction is retained for that limited purpose.

/s/ ROBERT A. FULLER
Robert A. Fuller, Judge

NO. 30 69 94
AC 11312

GRACE COMMUNITY CHURCH SUPERIOR COURT

V. JUDICIAL DISTRICT OF DANBURY

TOWN OF BETHEL AND PLANNING &
ZONING COMMISSION OF
TOWN OF BETHEL JULY 16, 1992

SUPPLEMENTAL MEMORANDUM OF DECISION ON MOTION TO RECONSIDER AND MOTION FOR ARTICULATION

When the decision was issued in this case, the court retained jurisdiction to allow reconsideration of the issues if the special permit was not issued by the Commission as directed by the court in the administrative appeal also decided on March 17, 1992. See *Grace Community Church* v. *Planning & Zoning Commission of Town of Bethel,* Superior Court at Danbury, No. 30 36 16, 6 Conn. L. Rptr. 152. That decision (hereafter called "administrative appeal"), is incorporated by reference as part of the supplemental decision in this case. The plaintiff has also filed a motion to reconsider or clarify the prior decision in this action dated April 20, 1992, and has filed a motion for articulation dated May 21, 1992. This supplemental decision is in response to both motions.

After the court sustained the plaintiff's administrative appeal on March 17, 1992 and ordered the Bethel Planning & Zoning Commission (hereafter called the "Commission") to issue the special permit, the Commission held a meeting and granted the special permit without conditions on April 14, 1992. No appeal was taken by anyone within fifteen days of publication of the Commission's decision granting the special permit. As a result, the Commission may proceed to construct the church building on its property and there is no indication that either the Commission

or the Town is imposing any restraints on the construction or on the exercise of religious activities of the plaintiff and its members.

In this case, the plaintiff requested a declaratory judgment that the provision in the Bethel Zoning Regulations requiring a special permit to construct a church in residential and other zones of the Town was in violation of both the U.S. and Connecticut Constitutions as: (1) a prior restraint on the free exercise of religion; (2) a denial of equal protection of the laws when the restraints imposed by zoning regulations on churches are compared with regulation of other uses; (3) void for vagueness in that the regulations contained no objective standards; and (4) the denial of a special permit for the subject property was an unconstitutional taking of it. As part of its claim of denial of free exercise of religion, the plaintiff claimed that the special permit provisions of the Bethel Zoning Regulations result in denial of the constitutional rights of assembly, association and free speech. In addition, the plaintiff alleges that the defendants violated a right under Article Seventh of the Connecticut Constitution to build churches. As a result, it claims that these constitutional violations of its civil rights entitled it to damages under 42 U.S.C. section 1983.

Even though the Commission has now granted the special permit, the plaintiff wants the court to decide whether the zoning ordinance provisions on special permits in general, as opposed to the action of the Commission on the application here, is unconstitutional, and if so, whether the plaintiff sustained damages from being subjected to unconstitutional regulations. The issuance of the special permit eliminates any right the plaintiff may have under the first count of the complaint for an injunction and similar relief for possible future injury, but does not prevent an action for damages for conduct prior to issuance of the permit. *Hallas* v. *Windsor*, 217 Conn. 689, 692.

By agreement of the parties at the trial of the case, proof of the amount of damages was deferred and plaintiff was not precluded

from offering proof of damages under section 1983, and attorney's fees under 42 U.S.C., section 1988, if the ordinance was held to be unconstitutional. The issue of damages, however, is academic because the plaintiff is not entitled to them under the factual situation in this case.

A party who challenges the constitutionality of a statute or ordinance must prove that the statute or ordinance has adversely affected a constitutionally protected right under the facts of his particular case and not merely under some possible or hypothetical set of facts, although an exception is made when first amendment freedoms are affected. *State* v. *Madera,* 198 Conn. 92, 106. The courts of this state resolve constitutional claims only when essential to decide the controversy between the parties. *Adolphson* v. *Zoning Board of Appeals,* 205 Conn. 703, 720. Moreover, a litigant can only challenge the validity of a statute or ordinance under the Connecticut Constitution as it has been applied to him, and he cannot claim that the provision is invalid because it impermissibly impinges upon the constitutional rights of others. *Husti* v. *Zuckerman Property Enterprises, Ltd.,* 199 Conn. 575, 589. Until the property owner has exhausted the procedures under a municipal zoning ordinance, there is no right to raise state constitutional issues. Id., 590, citing *Beit Havurah* v. *Zoning Board of Appeals,* 177 Conn. 440, 446; *West Hartford Methodist Church* v. *Zoning Board of Appeals,* 143 Conn. 263, 268. Finally, a claim that a regulation based on the police power and authorized by a statute is unconstitutional must be proven beyond a reasonable doubt. *Mario* v. *Fairfield,* 217 Conn. 164, 176.

Even though a municipal ordinance must be carefully considered when it may affect the constitutional guarantee of freedom of religion under the first amendment to the United States Constitution, churches and religious organizations can be subjected to religiously neutral regulation for secular governmental purposes under the police power, such as fire inspection, building and zoning regulations. *Lemon* v. *Kurtzman,* 403 U.S.

602, 614. They can also be subjected to reasonable regulation as to their location without violating the constitutional guarantee of freedom of religion as long as they are not completely excluded from residential zones. See Anderson, *American Law of Zoning,* 3rd Ed., section 12.2. In *St. John's Roman Catholic Church Corporation* v. *Darien,* 149 Conn. 712, 720, it was recognized that even though churches may not be completely excluded from residential zones, they can be subject to reasonable regulations as to their location, by requiring a special permit, without violating the constitutional guarantee of freedom of religion. While some cases from other states have held that it is illegal for a municipality to exclude churches in all zones, from all municipal zones or to allow them in the municipality only with a special permit (see *Grace Community Church* v. *Planning & Zoning Commission of Bethel,* supra, 159, and cases cited therein), each situation is evaluated under its existing factual circumstances, including standing to raise the constitutional issue.

The defendants never questioned or interfered with the right of the plaintiff or its members to express their religious views, associate or assemble for that purpose, on the subject property or anywhere else. The only limitation imposed was that a building to be used for a church could not be built on the subject property without complying with the special permit provisions in the zoning regulations. This provision applies to all other religious denominations and all other property owners proposing church buildings and any other uses allowed by special permit under existing regulations. The right of free exercise of religion under the federal constitution does not relieve individuals from complying with valid and neutral laws of general application on the ground that the law limits conduct that their religion allows or encourages. *Employment Division* v. *Smith,* 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). Such neutral regulations do not require a compelling state interest, id., 494 U.S. at 886, unless it restricts both the free exercise of religion and other constitutional rights such as freedom of speech, id., 494 U.S. at 881.

The plaintiff has received a special permit to build a church on its propety. There is nothing in the regulation which favors some churches or religious practices over others. The First Amendment limits the enactment of a law which prohibits the free exercise of religion, and there is a comparable provision in Article First, section 3 of the Connecticut Constitution. There is nothing in the record in the adminstrative appeal, the stipulation of facts by the parties in this case or evidence presented to the court that the Commission, the Town or any of its officials ever took any action to prevent the members of the plaintiff church from assembling or carrying out their religious activities anywhere in the Town. The requirement for a special permit to use the subject property, located in a residential zone, for a church building is applied to all other religious organizations and property owners similarly situated. As a review of the zoning map discloses, most of the Town (and well over 90 percent of its land) is in one of the residential zones, and only a small percentage of the Town's total area (the industrial zones and one commercial zone) is zoned to exclude churches. In evaluating claims that zoning regulations limiting use of land for churches unreasonably interfere with the right of free exercise of religion, the extent of the restriction by the municipality and the facts of each case are important. *St. John's Roman Catholic Church Corporation* v. *Darien,* supra, 720, 723-24, recognizes that churches may be subject to reasonable special permit provisions in zoning regulations. This is not a situation where churches are automatically excluded from most of the Town or subjected to more burdensome regulations than similar uses having a similar impact on the municipality. The cases relied upon by the plaintiff have been considered on their facts, and are materially different. A use allowed with a special permit is neither an automatically permitted use nor an excluded use, but rather a use which is permitted provided that existing standards in the zoning regulations are met. *A.P. & W. Holding Corporation* v. *Planning & Zoning Board,* 167 Conn. 182, 185.

The Town has a substantial governmental interest in enacting

zoning regulations under the police power, in placing different uses in different zones and in allowing others only with a special permit. As recently stated in *Barberino Realty & Development Corp.* v. *Planning & Zoning Commission,* 222 Conn. 607, 612-13, the nature of certain uses such as churches is that even though they may be generally compatible with uses permitted as of right in particular zoning districts, including residential zones, their precise location and mode of operation must be regulated because of topography, traffic problems, and neighboring uses of the site, since they can generate parking and traffic problems which might undermine the residential character of the neighborhood; the special permit approach provides the flexibility to solve this problem and allows churches in most cases. The regulations here would comply with the rational basis test. *Beacon Falls* v. *Posick,* 212 Conn. 570, 584-85; *Builders Service Corporation, Inc.* v. *Planning & Zoning Commission,* 208 Conn. 267, 284, 306. The plaintiff's claim that a compelling state interest is required to regulate under the factual circumstances here is not supported by any legal authority cited by it.

Even though the parties stipulated that lack of a regular meeting place disrupts or hampers the church activities of the plaintiff, the requirement of a special permit to use a particular parcel of land for a church building does not directly interfere with the religious freedoms of the plaintiff's members. The First Amendment cannot be extended to such an extent that a claim of exemption from the laws based on religious freedom can be extended to avoid otherwise reasonable and neutral legal obligations imposed by government. *Employment Division* v. *Smith,* supra, 494 U.S. at 888. The plaintiff has not shown that the regulation here, as applied to it, is an unreasonable restriction on the free exercise of religion, or any of the collateral rights of speech, assembly or association.

In addition, the plaintiff has not shown beyond a reasonable doubt that the special permit provisions of the zoning regulations which apply to churches deny a plaintiff its rights guranteed by

Article First, section 3 of the Connecticut Constitution. See *Husti* v. *Zuckerman Property Enterprises, Ltd.*, supra, 589.

It has also failed to prove that a denial of equal protection of the laws under the Fourteenth Amendment of the U.S. Constitution, and Article First, section 20 of the Connecticut Constitution. In order to hold a zoning regulation unconstitutional on grounds of denial of equal protection under the state or federal constitutions, it must appear that the provisions are clearly arbitrary and unreasonable and have no substantial relation to the public health, safety, morals or general welfare. *St. John's Roman Catholic Church Corporation* v. *Darien*, supra, 722. If the ordinance does not affect either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge. *Circuit-Wise, Inc.* v. *Commissioner of Revenue Services*, 215 Conn. 292, 300. The equal protection provisions of the federal and state constitutions have the same meaning and are subject to the same limitations. *Mario v. Fairfield*, supra, 174 n.; *State Management Assn. of Connecticut* v. *O'Neill*, 204 Conn. 746, 750. The equal protection clauses are violated only if the classification in the land use ordinance or regulations is based on grounds wholly irrelevant to the achievement of the objectives of the land use agency. *Mario v. Fairfield*, supra, 175. When considering the regulation under the "rational relationship" standard, the courts give every legal presumption and reasonable inference of fact in favor of upholding the regulation. Id.; *Blue Sky Bar, Inc. v. Stratford*, 203 Conn. 14, 22. The plaintiff must show beyond a reasonable doubt that the regulation is unconstitutional. *Mario* v. *Fairfield*, supra, 176; *Aaron* v. *Conservation Commission*, 183 Conn. 532, 537. While public recreational facilities are allowed in a residential zone as a permitted use, the uses which are allowed there only by special permit include private places of assembly and some public buildings such as clubs, comunity center buildings, day care or nursery schools, fire stations, libraries or museums operated by nonprofit corporations, nursing or convalescent homes, police

stations, post offices, schools, town highway facilities and town halls. See section 118-24 of the Bethel Zoning Regulations. The plaintiff relies upon certain uses allowed in one of the commercial zones in its claim of denial of equal protection, such as hotels, clubs or lodges, funeral parlors, theaters and fraternal organizations. However, the subject property voluntarily purchased by the plaintiff with knowledge that it needed a special permit to build a church is located in the residential R-40 zone. Comparing uses allowed by special permit in that zone with permitted uses in nonresidential zones is comparing apples and oranges. All nonpublic places of assembly in a residential zone in addition to churches require a special permit.

In *St. John's Roman Catholic Church Corporation* v. *Darien,* supra, it was held not to be a denial of equal protection to allow public schools as a permitted use in a residential zone while requiring a special permit for parochial and private schools. Moreover, a plaintiff can only challenge the constitutionality of the regulations under the factual circumstances of the case and the actual application of the regulation to it. *State* v. *Madera,* supra, 106. The plaintiff applied for and received a special permit from the Commission, and is not prevented from construction of the church at this time by the regulation.

The claim that section 118-21H of the Bethel Zoning Regulations does not contain objective standards fails for similar reasons: (1) the denial of the special permit by the Commission was reversed on nonconstitutional grounds, as discussed in the administrative appeal; and (2) the Commission has now issued the special permit so the general challenge to vagueness of the regulation on constitutional grounds is unnecessary.

The second count of the complaint alleges tht the zoning regulations also deprived the plaintiff of all use of its property in violation of the Fifth Amendment of the U.S. Constitution, from the date it acquired the option to purchase the land. The plaintiff church voluntarily purchased the property in July, 1989, at a time

when it did not have a special permit to use it for a church. The Commission granted a special permit for a church on the property when the plaintiff applied for it. That decision was overturned because the plaintiff's agents or supporters had illegally submitted evidence after the public hearing, when owners of land abutting the church property took an appeal. The church did not file a second special permit application until July 10, 1990. While the Commission denied the second application on October 9, 1990, that decision was overturned in the administrative appeal on March 17, 1992. At that point, the plaintiff obtained the special permit on April 14, 1992 without any conditions.

A claim of taking of property from application of land use regulations is premature until the land use agency makes a final decision on permitted uses of the property. *Port Clinton Associates* v. *Board of Selectmen,* 217 Conn. 588, 600, 604; *Gil* v. *Inland Wetlands & Watercourses Agency,* 219 Conn. 404, 415. Until a property owner has obtained a final decision regarding the application of the zoning ordinance to the property, it is impossible to determine whether the land retains any reasonable beneficial use and thus whether there was a deprivation of private property without just compensation in violation of the Fifth Amendment. *MacDonald, Sommer & Frates* v. *Yolo County,* 477 U.S. 340, 348-49; *Williamson County Regional Planning Commission* v. *Hamilton Bank,* 473 U.S. 172, 192, 193. To show finality, a property owner making a regulatory takings claim must prove that the agency will not allow any reasonable alternative use of the property. *Gil* v. *Inland Wetlands & Watercourses Agency,* supra, 415. Here the Commission initially approved the special permit in 1988. The 1990 application was only for a special permit to build a church. The plaintiff never applied to use the property for any other permitted use such as a residence, which would certainly have been approved by the Town. While use of the property for a church may have been the preferred option of the plaintiff, the maximum possible enrichment of a property owner is not a controlling purpose of zoning, *State National Bank* v. *Planning & Zoning Commission,* 156

Conn. 99, 102. Denial of one application does not prove that the agency will not allow any reasonable use of the property. *Gil* v. *Inland Wetlands & Watercourses Agency*, supra, 417.

Even a claim of a temporary taking of property requires the challenged regulation to deprive the property owner of all use of the property while the regulation is in effect. *First English Lutheran Evangelical Church* v. *Los Angeles County*, 482 U.S. 304, 321; *Port Clinton Associates* v. *Board of Selectmen*, supra, 601, 602. Normal delays in processing land use approvals are not considered temporary takings. *First English Lutheran Evangelical Church* v. *Los Angeles County*, 482 U.S., 304, 321.. Even though a property owner is successful in challenging a governmental regulation such as a zoning ordinance, the owner is not entitled to recoup financial losses because use of the property was temporarily delayed while the dispute was being resolved. *Port Clinton Associates* v. *Board of Selectmen*, supra, 602; *Williamson County Regional Planning Commission* v. *Hamilton Bank*, supra, 204. A facial challenge to the special permit provisions in the zoning regulations also fails since the plaintiff was not denied all economically viable use of the land even though construction of a church required a special permit. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 295-96, quoting *Agins* v. *Tiburon*, 447 U.S. 255, 260.

The decision in the administrative appeal discussed the unique provision in Article Seventh of the Connecticut Constitution which allows any religious society to build and repair houses for public worship. The administrative appeal was not squarely decided on Article Seventh, however, because the plaintiff was entitled to a special permit on nonconstitutional grounds. Even if the Commission's denial of the special permit violated that provision, an issue not decided in the administrative appeal or this case, that would still not entitle the plaintiff to monetary damages under 42 U.S.C., section 1983. In order to recover in a section 1983 action, the plaintiff must prove: (1) the defendant has deprived it of federally protected rights or privileges, namely,

rights secured by the constitution and laws of the United States; and (2) deprivation of that constitutional right was under the color of a statute, ordinance, regulation, custom or usage of a state or territory. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144; *Parratt* v. *Taylor*, 451 U.S. 527, 525; *Tedesco* v. *Stamford*, 215 Conn. 450, 456. There must be a deprivation of federal rights, namely, either rights under the federal constitution or a federal statute. *Maine* v. *Thiboutot*, 448 U.S. 1. See also *Screws* v. *United States*, 325 U.S. 91, 108. Since the plaintiff has not proven violation of any *federal* constitutional right or statute here, there is no basis for a section 1983 action. As a result, the plaintiff has no right to recover damages or attorney's fees for deprivation of federal civil rights.

Moreover, no statute has been identified which gives the right in this state to recover monetary damages for infringement of rights under the Connecticut Constitution. If one is intended, the legislature must create it.

The plaintiff's motion for articulation is in the form analogous to the prior procedure for findings and draft findings which has been abolished in appellate proceedings in this state. The plaintiff requests the court to make findings on the church's religious practices and the extent to which the temporary denial of a special permit made its religious practices and activities more difficult or expensive than if the plaintiff could have constructed a church building immediatley upon exercising its option to purchase the subject property in 1989. The motion also requests the court to answer questions proposed by the plaintiff rather than clarifying the basis of the written opinion. The prior discussion covers the essential facts and legal basis for the conclusions reached, and the findings requested are unnecessary to resolve the issues in this appeal. However, some comments in response to the motion for articulation are in order.

The court could only have awarded the plaintiff damages under section 1983 if the plaintiff proved a violation of federally

protected constitutional rights. While the plaintiff church presumably could have constructed a church building on the subject property after exercising its option to purchase the property in 1989 if not been required to obtain a special permit, a special permit had been granted by the Commission at that time. The procedural problem caused by the plaintiff's submission of improper evidence to the commission after the public hearing resulted in a successful appeal to revoke the permit. Neither the Commission nor the Town interfered with the right of the plaintiff church and its members to engage in religious speech or their rights to assemble or associate in Bethel or elsewhere. They did not require the church or its members to meet at Brookfield High School or anywhere else. While it undoubtedly would have been more convenient for the church to conduct its activities in a church building on its own property, the defendants did not preclude any of the activities deemed important by the church at any place or any time. The right of a church to conduct religious activities and to use specific property for that purpose do not necessarily coincide. See *New York Annual Conference* v. Fisher, 182 Conn. 272, 286. The importance to a religious denomination of particular religious activities is also an ecclesiastical matter which is not properly decided by the courts. Id., 288; *Jones* v. *Wolf*, 443 U.S. 595, 602.

While the plaintiff could have built a church quicker than it did if Bethel had no special permit requirement for churches and other similar uses in its zoning regulations, it was not proven that this made acquisition of the subject property or other sites in Bethel more expensive. In fact, land in a residential zone allowing nonresidential uses without a special permit may have been more expensive without such restrictions. The plaintiff also did not prove any claim of a competitive disadvantage on the part of churches over other potential buyers of property in acquiring land, or that other sites in Bethel were not available to construct a church building.

The findings of the Commission on the standards in section

118-21H of the Zoning Regulations, as applied to the subject property and its review of those standards and findings, is discussed in the administrative appeal. The issuance of the special permit by the Commission on April 14, 1992 precludes a constitutional attack on those standards, which apply to all special permits in general and are not restricted to churches. While the Town presented no evidence of its reasons for requiring churches to obtain special permits under the zoning regulations or any compelling governmental interest for doing so, it was not required to under the facts of this case.

For the above reasons, the court does not change the judgment of March 17, 1992 for the defendants.

/s/ ROBERT A. FULLER
Robert A. Fuller, Judge

NO. 91-0306994S	:	SUPERIOR COURT
GRACE COMMUNITY CHURCH	:	JUDICIAL DISTRICT OF DANBURY
VS.	:	AT DANBURY
TOWN OF BETHEL AND THE PLANNING & ZONING COMMISSION OF THE TOWN OF BETHEL	:	JANUARY 21, 1992

STIPULATION

The parties stipulate that the contents of the following affidavit may be introduced into evidence as a full exhibit. The admission of this Affidavit is limited to the issue of the Plaintiff's claims for a Declaratory Judgment and injunctive relief, and shall not be considered for the purpose of proving damages.

AFFIDAVIT OF NELSON MALWITZ

STATE OF CONNECTICUT)
) ss: Danbury
COUNTY OF FAIRFIELD)

Nelson Malwitz, being sworn upon his oath, deposes and states:

I. I am a resident of Brookfield, Connecticut and a member of Plaintiff Grace Community Church since its founding in 1981.

II. I am currently a member of the Board of Elders of the governing board of Grace Community Church and authorized by it to make this affidavit.

III. I have personal knowledge of the facts set forth in this affidavit and the complaint, and if called to testify, would attest that they are true.

IV. Grace Community Church is an evangelical protestant congregation not affiliated with any denomination.

V. Grace Community Church was founded in 1981 and first began regular meetings in February, 1982 with approximately 75 people at the ballroom of the Ramada Inn in Danbury, Connecticut, which neighbors Bethel, Connecticut.

VI. In the fall of 1982 the church moved its meetings to the cafetorium of the South Street Elementary School in Danbury.

VII. In September of 1985, membership had grown to about 250. The church then moved to its current meeting location at Brookfield High School in Brookfield, Connecticut. Brookfield High School is approximately 6 miles North of the proposed building site in Bethel (taking 12-15 minutes travel time), and is on the northern periphery of the area from which membership comes.

VIII. The church has been actively searching for a permanent meeting facility to own since 1981, prior to their first service as a church.

IX. The search for land on which to build began in 1982. The church has had numerous committees involved in the search and has used or contacted many commercial realtors in the process of the search, including Scalzo Realty in Bethel, and DeSoto Realty in Danbury, in an effort to locate an available and suitable site. To meet the needs of the congregation, a site of 8-10 acres minimum would be neded for a building, parking and green space.

X. The church first became aware of the possible availability of the 13.6 acre site which it now owns, (including 2.5 acres of

wetland upon which there are no plans to build), at Walnut Hill Road in 1985 and made an unsuccessful offer at that time. The site was being used for farming previously. Negotiations to acquire the site continued through June 1987. In the meantime, the church looked at many other sites which were not suitable or available.

XI. In June, 1987, the church and the prior owners of the land entered into an option agreement giving the church the right to buy the land for $450,000 for a period of 18 months, in return for $24,000. If the church exercised the option, the $24,000 would apply to the purchase price, if it did not exercise the option, the $24,000 would be lost. Because the Town of Bethel required a special permit before the church could build on the site, the church did not enter into an unconditional contract to buy the land knowing that if the special permit were refused, it could end up owning land it could not use.

XII. After the option was obtained in June 1987, the church had building plans prepared by an architect, had a site plan drawn up by an engineering and planning firm, and retained Associated Group, Inc. of Grand Rapids, Michigan, at a cost of approximately $143,000. All of that work was necessary to prepare for a special use permit application which was applied for in December 1987. Neighbors were notified, some of whom strongly objected to the granting of a special use permit to Grace Community Church. After hearings in June 1988, and July 1988, the Bethel Town Planning & Zoning Commission approved the special use permit, but the granting of the permit was overruled upon a court action brought by certain neighbors (docket number CV 88-0295893-S), upon the basis that questions asked by the Commission of the applicant's attorney to set conditions of approval after the June, 1988 public hearing were deemed the reception of evidence after the close of the public hearning that eliminated public rebuttal.

XIII. Due to the delay ensuing from the zoning permit

process and the zoning litigation, Grace Community Church was required by the prior owners of the land to pay an additional $11,400 to extend the option for 6 months, from December 1988 to June 1989. This $11,400 payment was not applicable to the purchase price.

XIV. In July 1989, the Church stood to lose the property and its original $24,000 in option money if it did not exercise its option to purchase. Accordingly, it did so at a price of $450,000, even though it did not yet have "special permission" to use the land as a church.

XV. Had the Bethel Zoning Ordinance freely permitted a church to be built at the site on Walnut Hill Road and Weed Road, the church building, according to contractor's estimates, would have been completed and ready for occupancy in December 1988. Because of the litigation necessitated by the existence of the special use requirement, the church building will not be ready until 18 months after a final court decision. The current cost estimate to complete the facility by December 1992 has risen by $419,800.00 from a December 1988 cost of $2,628,000.00 to $3,047,800.00 as a result of the delay caused by the Regulations.

XVI. Because of its lack of an adequate permanent meeting place, the following ministries of the church are being disrupted, burdened, rendered less effective, curtailed, made more expensive or omitted:

A. The Church currently rents meeting space on Sundays at Brookfield High School. Because it does not have its own facility, it must pay $70,000 per year in rent. The location of the high school is not central to the congregation membership resulting in many members having to drive 45 minutes to reach services, instead of 20-25 minutes, which would be the average time at the proposed location in Bethel. The site in Bethel is centrally located to the church's members.

B. The church strongly believes that baptism of new believers

should be by immersion undertaken soon after the new believer decides to become a Christian and celebrated in the midst of the church assembled. Because the Brookfield High School where the church meets does not have a swimming pool, new believers must often defer baptism until summer months when the church can go to a lake after the service. Because the baptism is at a different location and out of doors, and at a place with no nursery facilities, the elderly members and members with small children, are severely inconvenienced and often do not or cannot attend these church community events;

C. The church strongly believes that weddings should be an event celebrated within the church community. Because the church lacks a facility within which to perform the marriage ceremony and host a reception, church members being married face the considerable expense of renting another church, when they would like to be married at their own church. The scheduling of the wedding, the use of volunteers from the congregation to help with cooking or serving, and the planning of the atmosphere of the religious portions of the ceremony, are all made more difficult by having to find different locations for the weddings.

D. The church strongly believes that funeral services for members and for the family of members cannot be held appropriately at the Brookfield High School auditorium. The congregation members generally prefer a church building for a funeral service of family members, so that they and visitors may more easily be brought to think upon, believe and be comforted by the promises of eternal life, which are a part of the Christian religion. However, because Grace Community Church does not have its own building, funeral services at other churches are "subject to availability." Further, family and friends do not have the comfort of a "church home" surrounding them during the time of mourning. Not having our own church building results in extra costs for funerals also.

E. The religious education of the children of the church and

the making available of religious education to other children is a fundamental tenet of Grace Community Church. Because the size of the congregation results in many children who would attend a Vacation Bible School, we have been unable to locate an available church or other location large enough to accommodate the program we would like to run. We have the willing teachers, but because we lack a building, the children miss an important and irreplaceable time of education;

F. There are numerous activities which the leaders and members of Grace Community Church sense that God wants undertaken within the church, but are unable to do so because of the lack of their own building, including:

1. weekday Bible studies for women;
2. prayer meetings;
3. midweek youth activities;
4. weekend Jr. High and Sr. High events, such as inviting special outside speakers who direct their messages toward the problems of youth in dealing with drugs, sexuality, divorce in the family, suicide or peer pressure. In our youth events our speakers would emphasize solutions which are not allowed to be discussed in public schools, such as personal faith in Christ, prayer, and the support derived from Christian community (church attendance). We are able to have such meetings on Sunday nights at Brookfield High School, but Saturday and Friday nights are often better for scheduling speakers and attracting kids. It would be much easier to have these meetings on Saturday and Friday nights, or on weekday evenings if we had our own facility. In addition, the evening rental at Brookfield High School is $300, which we would not have to pay if we had our own building.
5. Sports activities such as basketball, volleyball, and floor hockey, which draw the members together. The planned facility has a gymnasium which could be used at various times during the week.

G. As part of its efforts to evangelize, the Grace Community

Church believes that its services should be made convenient and pleasant in order to make it more likely the visitors will attend, return, hear the Christian message and come to believe it. Evangelism is a central tenet of the church, and in this context is understood to mean having the Christian message presented at services through preaching, music, prayer, drama, and other means. Parents of small children often are uncomfortable with their children wiggling on their laps during service, or worse, screaming. Those parents, not to mention the folks sitting next to them, are less likely to hear the message or come back the next week if the service is distracting, uncomfortable or annoying. To further its evangelistic goal, the church feels that nursery care is **essential.** However, Brookfield High School has no nursery facilities, nor does it allow storage of nursery equipment. The church must therefore set up and take down, each Sunday, two nursery rooms. One is for children from birth through about 1½. The second is for children 1½ to 3. Each nursery averages 20 children for a total of 40 per Sunday. Six or seven volunteers must arrive at 8:30 a.m. for one hour's work to set up cribs, changing tables, rocking chairs, toys, childrens' furniture, and other equipment (these same volunteers load and unload the equipment—see following "H.2"). They then must take another hour to carefully pack the equipment into a truck until the following week. The 12-14 person hours per week is a burden to the volunteers, who must rise early and often drive separately from their families. After the service, the volunteers often miss the opportunity to socialize with other members. The lack of nursery facilities deprives the church of other volunteer services those members could give. The cost of owning a storage truck runs about $2,000 per year, including gas, license, depreciation, maintenance and insurance.

H. The Bible instructs us "Make a joyful noise unto the Lord." For that and other reasons our music ministry is an essential and fundamental part of our faith and worship. Singing and instrumental music uplift our spirits and we believe are pleasing to

God. Also, we realize that music makes the other elements of our worship (prayer, preaching, Bible reading), more enjoyable and meaningful. Young people especially like music and will be more likely to attend services and respond to the Christian message when the music ministry is effective. Thus, the expression of our faith through music is integral to our faith. However, the lack of a permanent facility impairs our music ministry in several ways.

1. the choir has ranged from 12-25 members, plus accompanying musicians, since the church began. We have had to rent facilities to practice in during mid-week instead. Currently this costs us $1,200 per year from September through June of each year.

2. The Brookfield High School does not provide storage facilities. The music portion of our worship includes speakers, microphones, and amplifiers. All of this equipment must be carried out of our storage truck, set up, retested, and packed away every week.

I. The church currently employs full-time and has employed since June, 1989 (except for temporary vacancies), a staff consisting of a Senior Pastor, Assistant Pastor, Youth Pastor, Church Secretary, and Church Administrator. This staff, in cooperation with the membership, carries out duties which are essential, fundamental, integral and irreplaceable to the life of the church. Such duties include visiting the sick, marriage and premarriage counseling, preaching, administering communion, baptisms, weddings and funerals, teaching, purchasing goods and services, accounting, correspondence with members, coordinating volunteers and many others functions. The weekly sermons delivered by the pastors (as well as sermons from visiting clergy and non-clergy) cover a wide range of topics, including purely religious issues, interpretation of Bible passages, relationships to other churches and faiths, as well as issues such as individual and social duties to the poor, sexual mores, abortion, war, peace, politics, and business. Currently, to enable the staff to function,

the church must rent 1,500 square feet of office space in a retail center. This results in a cost to the church of $12,099 per year, plus utilities. The current lease runs through June 1992, and is renewable in 12 month increments. If Grace Community Church had its own facility, it would not have this expense.

J. Brookfield High School has clearly stated to Grace Community Church that it will not be welcome there much longer. If we had our own building, this statement would not matter, but because the church has nowhere else to meet, the threat tends to create anxiety within the congregation and rendering the services of the church less enjoyable or edifying.

K. Many church Board meetings consisting of thousands of person hours of time for Elders, staff and others have been consumed in searching for a new site, planning for a new building, planning for zoning, litigation discussion, and other related activities stemming directly from the inability to freely build our church. Also, we have expended many thousands of person hours outside of Board meetings in talking to attorneys, bankers, neighbors, and others.

L. Many visitors have indicated they would attend regularly or become members if the church were not meeting in a high school auditorium. This view of some people has resulted in decreased participation in church activity, less giving than we would have received, and decreased effectiveness in a fundamental purpose of the church—to bring people to believe in Jesus and follow Him.

M. Many members have pledged to donate to the building fund, and would have, but for the delay in building. These members have now been transferred or moved away. They probably will not give. The amount lost is uncertain at this time, but easily is over $100,000.

N. The Church has already expended in excess of $170,000.00

for the services of architecs, attorneys, engineers and surveyors as a result of the special permit requirements of the Bethel Zoning Regulations.

/s/ NELSON MALWITZ
Nelson Malwitz, Affiant

Subscribed and Sworn to
before me this 21st day of
January, 1992.

/s/ JEROME A. MAYER
Jerome A. Mayer
Commissioner of Superior Court

The Plaintiff
GRACE COMMUNITY
CHURCH

By: /s/ JAMES M. MANNION
James M. Mannion

By: /s/ JOHN W. MAUCK
John W. Mauck

The Defendants

PLANNING AND
ZONING
COMMISSION
OF THE TOWN
OF BETHEL

By: /s/ STEPHEN C. GALLAGHER
Stephen C. Gallagher

Supreme Court, U.S.
FILED
SEP 30 1993
OFFICE OF THE CLERK

No. 93-179

In The

Supreme Court of the United States

October Term, 1993

GRACE COMMUNITY CHURCH,

Petitioner,

vs.

TOWN OF BETHEL AND BETHEL PLANNING AND ZONING COMMISSION OF THE TOWN OF BETHEL,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of The State Of Connecticut

BRIEF OF THE RESPONDENTS IN OPPOSITION

STEPHEN C. GALLAGHER
GALLAGHER AND GALLAGHER
30 Main Street, Suite 201
Danbury, Connecticut 06810
(203) 792-0525
Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

The Petitioner, GRACE COMMUNITY CHURCH, (hereinafter the Church) is an evangelical protestant congregation which owns a tract of land comprising 13.6 acres located at the intersection of Weed Road and Walnut Hill in the Town of Bethel, Connecticut. The zone in which the land is located is an R-40 residential zone. The Bethel Zoning Regulations for that zone allow a one-family residence on a plot of land containing a minimum of 40,000 square feet, with a minimum width of 140 feet. In addition, to specified permitted uses, mainly of a residential character, the Regulations allow several non-residential uses by Special Permit including a "Church, parish hall, and parish housing, including a convent or other similar residence for clergy." (Bethel Zoning Regulations §118-24B (2) lodged by Petitioner with clerk).

On July 10, 1990 the Petitioner submitted an application to the Bethel Planning and Zoning Commission (hereinafter the Commission) for a Special Permit to construct a Church and associated buildings on its property. The application was referred to several town officials and agencies for their comments. A public hearing was scheduled for August 14, 1990 which was subsequently continued to September 4, 11, and 18, 1990 due to the amount of public interest in the application.

On October 9, 1990 the Commission, at a regular meeting and after extensive discussion, by a 4 to 3 vote, denied the application.

From that decision, the Church brought an appeal to the Superior Court For the Judicial District of Danbury,

Connecticut *Grace Community Church v. Planning and Zoning Commission and the Town of Bethel,* et al. Docket #CV 90-0304616S (App. A). During the pendency of that appeal, the Church commenced this case against the same defendants seeking declaratory and injunctive relief and damages. The two matters were tried together before Judge Robert Fuller with the record in the first case being entered in its entirety as evidence in this case.

In addition, other testimony concerning the Church, its beliefs, activities and mission were offered into evidence. The Church claimed and the testimony revealed that the Church was a main line independent Protestant Evangelical Church. The Church began around 1981, and since 1985, has been attempting to locate a site and build a church to house its members during worship and a facility in which to carry on its various church related activities. The Church presently uses a high school in Brookfield, Connecticut, a town adjacent to Bethel, for its Sunday worship and other activities. The Church stated it would like to locate in Bethel because it believes it would be centrally located in the region from which it draws most of its members. About one-sixth of its members live in Bethel, more than that from neighboring Danbury, Connecticut, and the rest from the Danbury area The proposed location on Weed Road and Walnut Hill in Bethel is an old farm with no particular religious significance. The desire of the Church to build and have its own facility from the evidence presented, is no different from that of other churches desiring the same.

On March 17, 1992 Judge Fuller sustained the Church's appeal of its denial for a special permit and ordered the Appellant Commission to issue the Special

Permit for which the Church had applied (App. A). In rendering his decision, Judge Fuller pointed out that virtually the same application had been approved by the Commission in 1988, although that decision was reversed on appeal on procedural grounds (*Mark C. Hehl v. Bethel Planning and Zoning Commission* CV 88-0295893S). He found that absent a substantial change in circumstances, the Commission was bound to reapprove the application. Judge Fuller also found that the standard "that no condition will be created which will adversely affect traffic" which the Commission relied on in denying the Application, to be vague and an imprecise concept susceptible of several interpretations and, therefore, not a valid basis for denying the Special Permit. (App. A-21).

Subsequent to Judge Fuller's ruling, the Commission on April 14, 1992, issued to the Church the Special Permit for which it applied. No appeal was taken by either party from Judge Fuller's decision and no appeal was taken from the Commission's issuance of the permit. The Petitioner appealed the denial of its action for declaratory relief and damages to the Connecticut Appellate Court.

In rejecting their appeal, the Appellate Court found that the claim for injunctive and declaratory relief to be clearly moot, the Defendant Commission having issued the Plaintiff a special permit removing the basis for the need for relief. The Court concluded that it had no jurisdiction for injunctive and declaratory relief. (Petitioner Brief App. A-6).

In rejecting its claim for damages, the Court found that past Connecticut Supreme Court decisions, especially that of *St. John's Roman Catholic Corporation v. Darien*, 149 Conn. 712 (1962) supported the commission's position that the use of special permit procedures to regulate the location of churches in residential zones was a reasonable restriction and not violative of the Petitioner's right under the United States and Connecticut Constitutions.

In its petition, the Petitioner asserts that if it wishes to modify its building plans by adding, for example, a classroom, it must start over again in seeking a new special permit. (Petition For Writ of Certiorari P.5) Such a statement is misleading at best. The Church can never lose its Special Permit unless it fails to complete construction within the five years or extension thereof allowed by the Zoning Regulations. If the Church later wishes to expand its facilities, it would need only a modification of its Special Permit. While the procedures for obtaining the modification would be the same as for a new Special Permit, the Church would run no risk of losing the Special Permit it now holds.

ARGUMENT

1. THE PETITIONER'S CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF ARE MOOT.

The Petitioner has obtained through its administrative appeal and the subsequent action of the Commission that which it requested, the granting of a special permit to build a church on the land it purchased for that very

reason. There is nothing more to be reasonably gained from further litigation.

The Trial Court and the Connecticut Appellate Court quite rightfully ruled that its claims for declaratory and injunctive relief were moot. There is no present controversy for which a Court should become involved. The Appellate Court very carefully considered this question and concluded that:

> "In this case, the Plaintiff's claim for injunctive and declaratory relief clearly is moot. The Commission, having issued the Plaintiff a special permit, the Plaintiff is free to build a church on its property in accordance with the approved plans. The Plaintiff, therefore, has no present need for relief that would limit the applicability of the allegedly unconstitutional regulations. The regulations no longer stand as an obstacle to the Plaintiff's existing plans to build a church. In light of the mootness doctrine, therefore, we have no jurisdiction to consider the Plaintiff's claim for injunctive and declaratory relief." Grace Community Church v. Bethel, 30 Conn. App. 765, 770 (1993). (Petitioner's App. A-6).

In its petition for a Writ of Certiorari, the Petitioner makes several attacks against Bethel's zoning regulations but nowhere does it address the question of the mootness of its claims. Even if the regulations as constituted were unconstitutional (a claim the Respondents vigorously deny) the Petitioner has what it applied for – a special permit to build a church at the location it selected.

Its attack on the zoning regulations and its claim of possible future infringement are not matters properly

before the Court and its petition should accordingly be denied.

2. THE PROVISIONS OF THE BETHEL ZONING REGULATIONS AS THEY AFFECTED THE PETITIONER WERE NOT VIOLATIVE OF THE PETITIONER'S RIGHT UNDER THE FREE EXERCISE, FREE ASSEMBLY OR FREEDOM OF ASSOCIATION PROVISIONS OF THE FIRST AMENDMENT.

In its petition for a writ of certiorari the Petitioner has launched a wholesale assault on the entire Bethel Zoning ordinance. Such an assault completely ignores the history of this case. The record shows that the only site ever seriously considered by the Church in Bethel was the site on Walnut Hill Road and Weed Road in a residential zone. During the course of the appeal from the Administrative Decision denying the special permit there was evidence that the church considered a site in a commercial area which was rejected because the price was too high. It was not until almost a year had elapsed after the commencement of the administrative appeal that the Petitioner commenced this present action seeking declaratory, injunctive and monetary relief.

Zoning cases do not exist in a vacuum. They exist within a certain factual situation. In this case the controversy actually revolved around the ability of the church to construct a church in a residential zone where the local zoning regulations required a special permit. The validity of a requirement of a special permit for churches to construct in residential zones has long been recognized in Connecticut. *St. John's Roman Catholic Church v. Darien*, 149 Conn. 712 (1956), *West Hartford Methodist Church v.*

Zoning Board of Appeals, 143 Conn. 263 (1956), *Barberino Realty and Development Corporation v. Planning and Zoning Commission*, 222 Conn. 607 (1992).

The Appellate Court in considering the Petitioner's claim for damages carefully considered the use of the special permit requirement. The Court found the regulations did not violate the Petitioner's First Amendment Rights and did not support an action for damages. This holding is consistent with past Supreme Court decisions in this area. There is nothing in the record of the present case which would warrant overruling that opinion.

The Petitioner has attempted to divert attention from the central issue of these cases, the location of its church on Walnut Hill Road and Weed Road, by attacking the Zoning ordinance in general. The Church is alleging that because a church also required a special permit to build in a commercial zone that this somehow impacted its ability to build on the site it selected in a residential zone on Walnut Hill Road. From there it wages a wholesale assault on Bethel's Zoning Regulations ignoring the fact that it never seriously considered any other site than the site for which it now has obtained a permit. In doing so it is attempting to avoid the requirement of having to receive a special permit should it ever wish to expand the limits of its church beyond the limits set forth in the special permit which it now holds. No Court should ever act based solely on the fears or apprehensions of the party applying for it. *Nicholson v. Connecticut Half-Way House, Inc.*, 153 Conn. 507, 511 (1966).

3. THE RULINGS OF THIS COURT CONCERNING LIVE NUDE DANCING HAVE NO RELEVANCE TO THE ISSUES OF THIS CASE.

The Petitioner in raising this issue in the context of this case have resorted to the use of a "red herring". It completely ignore the fact that a use such as live nude dancing is no where allowed in the residential zone in which it applied and ultimately received its permit to build a church. As previously pointed out in this Brief, in addition to residential uses the Bethel Zoning Regulations, allows *many* other uses by Special Permit including a Church[1]. None of those uses could remotely support a request for the type of live nude dancing mentioned in the Petitioner's brief. In fact in this case religious uses are permitted in the residential zones by Special Permit, but live nude dancing is not.

Whatever validity that may attach to Petitioner's comparisons between cases involving live nude dancing and the practice of religion are not applicable here. There is no basis for the implication that vice is protected in Bethel while the free exercise of religion is not. The crux of this case is that the Petitioner chose to locate its facility in a residential zone. As is common in most towns, that choice involved its receiving a Special Permit to build a non-residential use. As is common with many proposals for non-residential uses in a residential zone that choice created a certain amount of opposition based on fears of noise, congestion, traffic and lower property values. It

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[1] (A list of the 27 Special Permit uses allowed in a residential zone is set forth in §118-24 B of the Bethel Zoning Regulations, a copy is lodged with the clerk).

was not denied permission by the Commission by a 4 to 3 vote because of the content of its religion, but because of the adverse affect it would have on traffic. Ultimately, however, the church received what it asked for, permission to build its church.

The Petitioner's statement that *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 and *Playtime Theaters v. City of Renton,* 475 U.S. 41 stand for the proposition that live nude dancing and adult movie theaters cannot be zoned out of any community anywhere in the U.S. absent a strictly scrutinized compelling state interest while churches in many areas have no protection is absurd. In the *Schad* case the Court struck down a municipal prohibition against live nude dancing where the municipality took the position that no live entertainment was allowed in its commercial zone, a position that this Court stated was simply not supported by the record. In the *Renton* case this Court upheld a City Zoning regulation prohibiting "Adult Theaters" within 1000 feet of a church school or residential Zone even if located in a commercial zone. Churches far from being discriminated against, are allowed to be protected against intrusions from those seamier forms of "entertainment" that too often dot our towns and cities.

4. THE BETHEL ZONING REGULATIONS AS APPLIED TO THE PETITIONER DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The Respondents vigorously contest that these questions can be properly raised within the context of this

case. It also asserts, however, that even if properly raised the Zoning Ordinance violates none of the Petitioner's protected rights. The Appellate Court clearly found that the Bethel Zoning Regulations were content neutral and met the standards set forth in *Hustsi v. Zuckerman Property Enterprise, LTD,* 199 Conn. 575, (1986).

> A content-neutral zoning regulation that restricts the permissible time, place and manner of protective speech is constitutional under the First Amendment if the regulation is designed to serve a substantial governmental issue and allows for reasonable alternative avenues of communication. Id., 581 quoting *Renton v. Playtime Theaters, Inc.*, 475 U.S 41, 50, 106 S.Ct., 925, 89 L.Ed.2d 29 (1986).

The Petitioner is contending in effect that it has an absolute right to build somewhere in Bethel and because that right is governed by the Special Permit process that the Zoning Ordinance is invalid. It ignores the fact that over 90% of the land in Bethel is zoned so as to allow the building of churches. *Supplemental Memorandum of Decision* (Petitioner's Brief App. C-6). The Petitioner relies upon certain uses being allowed in one of the commercial zones as a matter of right while churches require a special permit. They continue to ignore the fact that they voluntarily purchased property in a residential zone with the knowledge that they needed a special permit to build a church. Their argument is one of comparing apples to oranges.

The *Cleburne*[1], *Lamb's Chapel*[2], *Widmar*[3] and *Lukumi*[4] cases cited by the Petitioner as being in conflict with the holding in this case are not even applicable to this case. None of these cases dealt with the right of a town to require special permits for churches to locate in residential zones. In the Lukumi case, for example, the Court was faced with a City having enacted an ordinance specifically designed to prohibit the religious practice of the Church in question. There is no question but that the Bethel Zoning Regulations are one of general applicability and have been in effect for a substantial period of time prior to the Church's application.

The Petitioner's quote from *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9 Cir. 1990), cert. den. 498 U.S. 999, 111 S.Ct. 559, 112 L.Ed.2d 565 (1990). (Petitioner's Brief P. 13) regarding the dangers of local zoning authorities considering neighborhood opposition to applications for special permits from churches. The full quote from that case is as follows:

> "*Contrary to the arguments of the Church*, neighborhood opposition to the granting of a conditional use permit is not unlawful and should be considered by the Planning Commission." (emphasis ours)

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[1] *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L.Ed. 313, 105 S.Ct. 3249 (1985).

[2] *Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. (1993).

[3] *Widmar v. Vincent*, 454 U.S. 263 (1981).

[4] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, No. 91-948 June 11, 1993.

Christian Gospel Church, Inc. v. City and County of San Francisco, supra at 1225. The Petitioner seems to be advocating a position that churches have an absolute right to locate in residential zones and the residents have no rights to voice their opinion. How they justify the denial of the residents' rights of free speech under the First Amendment is missing from their brief.

5. THE BETHEL ZONING REGULATIONS REGARDING THE REQUIREMENT OF CHURCHES TO OBTAIN A SPECIAL PERMIT TO BUILD IN A RESIDENTIAL ZONE ARE NOT VIOLATIVE OF THE PETITIONER'S RIGHTS UNDER THE CONSTITUTION.

The Petitioner's arguments here are especially weak. It alleges that the provisions are patently and probably deliberately vague to give the Zoning Commission maximum power and discretion. It cites no evidence or authority to support its position. A review of the record in this matter will show that the Petitioner was never discriminated against on the basis of its religious views. Its application to build in a residential zone produced opposition based solely on perceptions that the Church would produce noise, traffic, congestion and lower property values. The Commission, even when it denied the Application, found that the Church had fulfilled two of the required three criteria set forth in §118.21 H of the Bethel Zoning Ordinances. Only on the basis of traffic was the Church denied a permit. It is clear that there was

no constitutional violations in either the zoning regulations or the way they were applied to the Church.

CONCLUSION

It is difficult for the Town of Bethel and its Planning and Zoning Commission to perceive why the Church is pursuing this appeal. It has received by virtue of the Commission's compliance with Judge Fuller's order in the Administrative Appeal exactly what it applied for. With respect to its building of a Church, there is no present controversy. Its attack on the zoning regulations began one year after it commenced its Administrative appeal of the denial for a special appeal.

This action raises issues that are in no way germane to its building a Church on the location it selected. It seems to rest its case on the fact that at the time it applied for its special permit, Churches also had to obtain special permits in some commercial zones where they were also permitted.

Its attack has been denied by the Connecticut Appellate Court and, in effect, by the Connecticut Supreme Court which refused to grant certification from the decision. It has nowhere put forth any reasons why this Court should disturb the underlying principle in this case that the location of churches in residential zones may be regulated by the use of Special Permit Regulations. These types of regulations have been upheld not only by the State of Connecticut, but by many other states including cases cited by the Petitioner in it's petition. It's petition

for a Writ of Certiorari to review the decision of the Connecticut Appellate Court should be denied.

Respectfully Submitted,

STEPHEN C. GALLAGHER
Counsel of Record

GALLAGHER AND GALLAGHER
30 Main Street
Suite 201
Danbury, Connecticut 06810
(203) 792-0525

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APPENDIX

NO. 30 36 16

GRACE COMMUNITY CHURCH

V.

PLANNING & ZONING COMMISSION OF THE TOWN OF BETHEL, ET AL.

SUPERIOR COURT

JUDICIAL DISTRICT OF DANBURY

MARCH 17, 1992

MEMORANDUM OF DECISION

This is an appeal from the denial of a special permit to construct a church building in a residential zone, which questions, among other issues, whether municipal zoning laws can exclude churches as a permitted use anywhere in the municipality and whether denial of a special permit for a church violates the state and federal constitutions. The plaintiff has also raised these constitutional questions in a direct attack on the Bethel Zoning Regulations in a separate action for a declaratory judgment which was consolidated for trial with this appeal (Grace Community Church v. Town of Bethel, et al., CV 91-0306994S).

The plaintiff, Grace Community Church, is an ecclesiastical church corporation which is the owner of a parcel of about 13.6 acres on Walnut Hill Road in Bethel. The property is in a residential area and in the R-40 zone. Grace Community Church is a non-denominational church with approximately 500 members but no church building. It has been using Brookfield High School on

Sundays for religious services and related church activities. It previously obtained approval from the Commission on July 26, 1988 for a special permit and a related site plan for a church building on the 13.6 acre parcel. That approval was overturned on procedural grounds when abutting property owners brought a successful appeal to the Superior Court.

The plaintiff then submitted another application to the Commission for a special permit and site plan approval which was substantially similar to the prior application with a slightly smaller building. While the site has frontage on both Walnut Hill Road and Weed Road, the two proposed driveways for the site were both off Walnut Hill Road. The proposed church building contained about 19,000 square feet covering less than one-half acre of the site. The Commission approved the site plan on June 26, 1990. After the church filed the second special permit application on July 10, 1990, the Commission scheduled a public hearing on the application for August 14, 1990 and referred it to several town officials and agencies for their review. Their reports back to the Commission were favorable and any modifications or conditions which were suggested were either of no concern to the Commission, agreed to by the applicant or were not relevant to the grounds of the Commission's decision. There was an extensive public hearing on August 14, 1990, which was continued to September 4, 1990 and September 11, 1990. There was both support for and opposition to the application. Both sides had traffic experts who had prepared reports, discussed them, and answered questions. On October 9, 1990, the Commission extensively discussed the application and voted to deny it

based on Sec. 118-21H(3) of the Bethel Zoning Regulations, a general provision concerning traffic conditions. That was the only concern of the Commission as reflected in the minutes of its decision-making session, and the only reason assigned for denial of the application. The plaintiff appealed to this court within fifteen days after publication of the agency's decision as required by Sec. 8-8 of the General Statutes.

As the owner of the property which was the subject of the special permit application, the plaintiff is aggrieved by denial of its application. *Winchester Woods Associates v. Planning & Zoning Commission of Madison*, 219 Conn. 303, 308, ___A.2d___ (1991); *Bossert Corporation v. Norwalk*, 157 Conn. 279, 285, 253 A.2d 39 (1968).

This appeal raises both constitutional and nonconstitutional claims. Issues which were raised in the appeal but not briefed by the plaintiff, such as a claim that denial of the special permit is an unconstitutional taking of the property, are considered abandoned. *Shaw v. Planning Commission of Southbury*, 5 Conn. App. 520, 525, 500 A.2d 1338 (1985). Before constitutional claims can be considered, it must be determined whether the appeal can be sustained on a nonconstitutional issue. *Adolphson v. Zoning Board of Appeals of Fairfield*, 205 Conn. 703, 720, 535 A.2d 799 (1988); *Maloney v. Pac*, 183 Conn. 313, 324, 439 A.2d 349 (1981).

Most of the land in Bethel is in one of five single family residence zones. Permitted used in the single family residence zones include, among other uses, (1) one single family dwelling per lot; (2) certain types of home or professional offices and customary home occupations;

(3) community recreation facilities, not including an amusement park or privately owned facility; (4) farming, dairy, truck or nursery gardening; (5) a public library; (6) a public recreational facility operated by a governmental unit; (7) a family day care home. Section 118-24A of the Bethel Zoning Regulations. About thirty additional uses are allowed by a special permit in residential zones. Section 118-24B. They include the use applied for by the plaintiff, a "church, parish hall and parish housing, including a convent or other similar residence for clergy." Churches are allowed only with a special permit in all residential zones and some commercial zones, which comprise most of the land in the town. They are not a permitted use in any zone. Other uses allowed in residential zones by special permit include clubs, community center buildings, day care or nursery schools, fire stations, kennels, libraries or museums operated by nonprofit corporations, nursing or convalescent homes, police stations, post offices, private golf, tennis or swim clubs, schools, town highway facilities and town halls. Special permits require approval of a site plan which has numerous specific requirements. Sections 118-24C and 118-34B. Other requirements for special permit approval are contained in Sec. 118-21 which includes subsection H which provides:

> "Notwithstanding any other provision of this regulation, no special permit shall be approved unless the Planning & Zoning Commission shall have found that:
>
> (1) The proposed use will have no detrimental effect on present and future dwellings in the vicinity.

(2) The proposed architecture, site plan and landscaping are in harmony with the character of the neighborhood.

(3) No conditions will be created which will adversely affect traffic."

The Commission members agreed at their meeting on October 9, 1990 that the proposed church building and site plan complied with subsections (1) and (2), namely, that the proposed use did not have a detrimental effect on the neighbor hood, and the proposed design of the building and site were consistent with the character of the neighborhood. Their concern, and the reason for denial, was based on traffic conditions and interpretation of subsection (3) of the Regulations.

1. Test on review of special permits.

When a land use agency, such as a zoning commission, acts upon a special permit, it is required to give reasons for its action. Section 8-3c of the General Statutes. When reasons are given, the Superior Court on appeal determines whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations which the agency is required to apply under the zoning regulations. *DeMaria v. Planning & Zoning Commission of Enfield*, 159 Conn. 534, 541, 271 A.2d 105 (1970); *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, 168 Conn. 304, 305, 306, 362 A.2d 1375 (1975); *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, 17 Conn. App. 53, 56, 549 A.2d 1076 (1988). Where the Commission gives reasons for its action, the court does not go behind the official

collective statement of the Commission to find other reasons which might have influenced some or all of the members of the Commission to reach a final collective decision. *DeMaria v. Planninq & Zoning Commission of Enfield*, supra, 541. Where a special permit is denied, it is sufficient if any one of the reasons given supports the agency's action. *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, supra, 306. Where none of the assigned reasons are valid, the court can sustain the appeal and order the special permit granted, *DeMaria v. Planning & Zoning Commission of Enfield*, supra, 541, 542, at least where there is no other apparent problem of noncompliance with the zoning regulations.

When acting upon a special permit, a zoning commission acts in an administrative capacity. *Sheridan v. Planning Board of Stamford*, 159 Conn. 1, 16, 266 A.2d 396 (1970). The Commission should determine whether (1) the proposed use of the property is expressly permitted under the zoning regulations, *Weigel v. Planning & Zoning Commission of Westport*, 160 Conn. 239, 246, 278 A.2d 766 (1971), (2) whether the standards in the relevant zoning regulations are satisfied; *Farina v. Zoning Board of Appeals of Trumbull*, 157 Conn. 420, 422, 254 A.2d 492 (1969), and (3) whether conditions necessary to protect public health, safety, convenience and property values, as provided by Sec. 8-2 of the General Statutes, can be established. *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, supra, 307.

A church is allowed in a residential zone with a special permit, and the Commission did not find noncompliance with any specific standards in the zoning regulations. The Commission did not resolve conditions for

traffic control devices which would prevent traffic problems, although it discussed them, because a majority of the Commission thought the special permit should be denied for noncompliance with the general regulation concerning traffic conditions. There was a difference of opinion between the Commission members themselves, and between the parties to this appeal, as to the meaning and application of Sec. 118-21H(3).

If a special permit application conforms with the standards in the statutes and the agency's existing regulations, it must be approved. *A.P. & W. Holding Corporation v. Planning & Zoning Board of Milford*, 167 Conn. 182, 185, 355 A.2d 91 (1974); *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, supra, 56. The Commission cannot require the applicant to meet conditions not contained in the regulations themselves. *DeMaria v. Planning & Zoning Commission of Enfield*, supra, 540, 541; *Powers v. Common Council of Danbury*, 154 Conn. 156, 160, 222 A.2d 337 (1966). A special permit can only be denied for failure to meet specific standards in the regulations, and not for vague, general reasons. *DeMaria v. Planning & Zoning Commission of Enfield*, supra, 541. See also *Kosinski v. Lawlor*, 177 Conn. 420, 423, 418 A.2d 66 (1979).

On appeal, the court reviews the record before the agency and determines whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations which the Commission is required to apply under the zoning regulations. *Holt-Lock, Inc. v. Zoning & Planning Commission of Granby*, 161 Conn. 182, 190, 286 A.2d 299 (1971); *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, supra, 168 Conn. at 306; *Spectrum of Connecticut, Inc. v. Planning &*

Zoning Commission of Ellington, 13 Conn. App. 159, 163, 535 A.2d 382 (1988). "The settled standard of review of questions of fact determined by a zoning authority is that a court may not substitute its judgment for that of the zoning authority as long as it reflects an honest judgment reasonably exercised." *Oakwood Development Corporation v. Zoning Board of Appeals of Torrington*, 20 Conn. App. 458, 460, 567 A.2d 1260 (1990). Facts supporting the agency's decision also include knowledge acquired by commission members through personal observation of the site, or through personal knowledge of the area involved in the application. Id., 460. Credibility of witnesses is also within the discretion of the Commission. *Spectrum of Connecticut, Inc. v. Planning & Zoning Commission of Ellington*, supra, 163. Despite deference to the agency on factual issues and findings, "a court cannot take the view in every case that the discretion exercised by the local zoning authority must not be disturbed, for if it did the right of appeal would be empty." *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, supra, 17 Conn. App. at 57, quoting from *Suffield Heights Corporation v. Town Planning Commission*, 144 Conn. 425, 428, 133 A.2d 612 (1957). Particularly close scrutiny is required here since the Commission's action indirectly implicates freedom of religion under the state and federal constitutions. The Commission's inability to reconcile the conflicting traffic reports and to agree on the proper interpretation of the regulation also requires some consideration of the credible evidence before the Commission on the issue of traffic.

2. Traffic conditions as affecting right to a special permit.

The zoning enabling statute, Sec. 8-2 of the General Statutes, provides in part that zoning regulations "shall be designed to lessen congestion in the streets." Accordingly, the consideration which applies to zoning applications is not the overall volume of traffic, but whether the increase in traffic will cause congestion. *Lathrop v. Planning & Zoning Commission of Trumbull*, 164 Conn. 215, 222, 319 A.2d 376 (1973). See also *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, supra, 17 Conn. App. at 69, 549 A.2d 1076 (1988). In addition, a land use agency cannot deny an application for a permitted use because of off-site traffic considerations. *TLC Development, Inc. v. Planning & Zoning Commission of Branford*, 215 Conn. 527, 532, 533, 577 A.2d 288 (1990) (site plan); *Sowin Associates v. Planning & Zoning Commission of South Windsor*, 23 Conn. App. 370, 374, 375, 580 A.2d 91 (1991) (subdivision). See also *Beit Havurah v. Zoning Board of Appeals of Norfolk*, 177 Conn. 440, 443, 418 A.2d 82 (1979), indicating that designation of property as a permitted use establishes a conclusive presumption that it does not adversely affect the district, which precludes further inquiry into the effect of development of the site upon traffic. Arguably, a different standard applies to special permits, since they are not permitted uses. They are uses which are allowed only under conditions specified in the zoning regulations. While this issue has not been settled under Connecticut law, and does not have to be resolved to decide this case, decisions from other states recognize that any development causes some increased traffic, and conclude that in order to deny a special permit because of

traffic, a project must cause traffic congestion and have a greater impact on the area than other permitted uses for the same property not requiring a special permit. *Miller v. Kiwanis Club of Lock Haven, Inc.*, 29 Md. App. 285, 347 A.2d 572 (1975); *Gowl v. Atlantic Richfield Co.*, 27 Md. App. 410, 341 A.2d 832 (1975); *Hobbs v. Albanese*, 417 NYS 2d 556, 70 App. Div. 1049 (1979); *Fantastic Plastic v. Zoning Board of Adjustment*, 332 A.2d 557 (Pa. 1975). See also *Cape Ann Land Development Corp. v. City Council of Gloucester*, 374 Mass. 825, 373 N.E.2d 218 (1978). Some of the permitted uses in the R-40 zone arguably have an equal or greater impact upon traffic than construction of a church.

The Commission did not expressly make a finding of traffic congestion, although it was bothered by the conflicting conclusions in the two 1990 traffic studies (Exhibits 18 and 19) and attempted to reconcile them. The conflicting opinions should not have been surprising, and is reminiscent of another case where the court noted:

> "Most of the oral testimony before the commission consisted of glowing statements by the proponents' attorneys on the advantages to the community of the project, while the attorneys for the opponents painted a gloomy picture of the effect upon the neighborhood if the gargantuan plans received approbation. Each side produced experts, or reports by experts, in the fields of traffic control and town planning. Their opinions favored the view of their employers."

Whalen v. Town Plan & Zoning Commission of Fairfield, 146 Conn. 321, 325, 326, 158 A.2d 312 (1959). While the zoning regulations do not require a traffic study to be submitted with a special permit application, the plaintiff retained a

traffic expert who prepared a report for both the 1988 and 1990 submissions. (Exhibits 18 and 23.) The opponents, mostly neighboring property owners, hired their own traffic expert who had the benefit of reviewing both of the proponents' reports, and used some of their data in critiquing them. (Exhibit 19.) While the opinions on the effect of additional traffic vary, the reports show basic agreement on road configuration, existing traffic volumes and accident statistics.

Access to the site is off Walnut Hill Road, a substantial distance from the intersection of Weed Road to the west and Old Hawleyville Road to the east. The sight distances from the proposed entrance on Walnut Hill Road is about 620 feet to the west and 450 feet to the east, well in excess of the minimum sight distance of 200 feet for a road with a posted speed limit of 25 miles per hour. If the church is built, the Sunday peak hour for traffic will be between 12:00 noon and 1:00 p.m. The present traffic volume in both directions on Walnut Hill Road for the peak hour is 69 vehicles. Vehicle traffic for Weed Road and Old Hawleyville Road at their intersections with Walnut Hill Road are 40 and 515 vehicles per hour respectively. With a projected attendance at church services of 508 persons, the site would generate 245 vehicle trips on Walnut Hill Road during the peak hour, with 15 vehicles entering and 230 vehicles leaving the property. The applicant's report projected that 220 of the 230 vehicles leaving the site, 220 would go easterly on Walnut Hill Road to the Old Hawleyville Road intersection. There is a stop sign on Walnut Hill Road at the Old Hawleyville Road intersection, but no traffic control device on Old Hawleyville Road. It was projected that 150 of the 220 vehicles would

make a left turn on Old Hawleyville Road and proceed to a traffic light at Newtown Road (Route 6). The other ten cars leaving the site would proceed westerly on Walnut Hill Road to the Weed Road intersection. There is no traffic control device on Walnut Hill Road but a stop sign on Weed Road. Both reports were in agreement that the present level of service in both directions on Walnut Hill Road is either level of service A or B and that the additional traffic from the church site which turned westerly on Walnut Hill Road to Weed Road would not significantly change those levels.

Levels of service are rated A through F by traffic engineers, and are used to describe traffic flow conditions. The capacity of a roadway or intersection is defined as "the maximum rate of vehicles which have a reasonable expectation of passing a given section of a lane or roadway during a given time period under prevailing roadway and traffic conditions." Prevailing conditions take into account physical operating conditions and traffic characteristics including roadway alignment, number and width of lanes, direction of traffic, traffic control devices and other factors. Vehicle capacity determines the ability of a Roadway or intersection to accommodate traffic under various levels of service. The levels of service are a measure of factors which influence the amount of traffic congestion, including speed and travel time, traffic interruption, safety and delays. Level of Service A is the best condition. Level of Service F is characterized by volumes greater than the roadway capacity as complete congestion occurs, and it is considered unacceptable traffic operations. Level of Service E is defined as the actual capacity of the roadway and involves delay to all

motorists due to congestion; it is considered to be the limit of acceptable delay, with delays of 40 to 60 seconds per vehicle. Service Level F involves delays of over 60 seconds. A level of service for unsignalized intersections is stated in terms of reserve or unused capacity of the approach lane in question, measured in additional vehicles per hour.

There was a significant difference of opinion on the level of service at the Walnut Hill Road intersection with Old Hawleyville Road resulting from an additional 220 vehicles during the peak hour. The applicant's report anticipated a service level between A and C while the opponents' report anticipated Level F because of cars making a left turn at the intersection onto Old Hawleyville Road. A related consideration was that there had been 30 accidents at the intersection in a five and one-half year period.

Walnut Hill Road is generally 20 to 21 feet in width, and there were only two accidents in five and one-half years at the Weed Road intersection with Walnut Hill Road. The applicant's traffic study did not address service levels at that intersection, although it should have been obvious to the Commission that with the small number of vehicles involved it would be Service Level A. The opponents' report argued that a higher percentage of cars leaving the site would proceed westerly on Walnut Hill Road to that intersection and then proceed northerly on Weed Road to Route 6. The report did not indicate whether going the opposite direction on Walnut Hill Road would improve the service level at the Old Hawleyville Road intersection. The opponents' report also

questioned adequacy of sight distances and width of the roadways near the site.

The minutes of the Commission's discussion of the conflicting traffic reports shows concern and confusion on its part on whether there was adequate compliance with the regulation. While there was some discussion about changes in traffic control devices at the Walnut Hill Road – Old Hawleyville Road intersection, the Commission was uncertain whether it could act because it did not have direct control over such changes. In fact, the Commission could have approved the special permit conditional upon a modification of traffic control devices at the intersection. *Lurie v. Planning & Zoning Commission of Westport*, 160 Conn. 295, 307, 278 A.2d 799 (1971) (conditional approval of a special permit was valid where applicant would pay for off-site improvements and initial approval was obtained from the State Highway Department).

The plaintiff claims that the general, vague standard relied upon by the Commission was inadequate to prevent approval of the special permit. The regulation requires the Commission to find that "no conditions will be created which will adversely affect traffic." Several concepts support the plaintiff's position. Zoning regulations, which are in derogation of common law property rights, should not be construed to include or exclude by implication matters that are not clearly within their expressed terms. *Planninq & Zoning Commission of Lebanon v. Gilbert*, 208 Conn. 696, 705, 546 A.2d 823 (1988). While the interpretation of a zoning regulation by a land use agency is entitled to some deference, the interpretation of provisions in the ordinance is a question of law for the

court. *Danseyar v. Zoning Board of Appeals of Middletown*, 164 Conn. 325, 327, 321 A.2d 474 (1973); *Thorne v. Zoning Board of Appeals of Stamford*, 156 Conn. 619, 620, 238 A.2d 400 (1968). The proper consideration for traffic in a zoning context is not whether the use increases traffic volume, but whether it causes a traffic hazard or traffic congestion. *Lathrop v. Planning Zoning Commission of Trumbull*, supra, 222. However, the regulation does not refer to traffic congestion and it is apparent from the discussion on the application (Exhibit 49) that the Commission was uncertain exactly what it had to consider to determine whether the project conformed with the regulation. Some Commission members had the impression that any change in the level of service, even short of Level F, violated the regulation. Other discussion focused on road and sight line distances at locations not near the site and on highways other than Walnut Hill Road. A municipality has a legal duty to maintain its highways in a reasonably safe condition for public travel, *Stamford Dock & Realty Corp. v. Stamford*, 124 Conn. 341, 344, 200 A. 346 (1938), and cannot deny access to a public highway on the excuse that it has not adequately maintained its roads.

3. General regulation as ground for denial of special permit.

Part of the Commission's problem in applying the regulation resulted from the vagueness of the regulation itself. Administrative regulations must have adequate, fixed and sufficient standards to guide the agency in their application to avoid decisions which allow the agency to interpret the regulations in more than one manner and

apply them arbitrarily. *Ghent v. Planning Commission of Waterbury*, 219 Conn. 511, 517, ___ A.2d ___ (1991); *Sonn v. Planning Commission of Bristol*, 172 Conn. 156, 162, 374 A.2d 159 (1976). A property owner cannot be required to offer sufficient proof as the agency may require to allow use of property where the agency's view is not guided by fixed standards. *Helbig v. Zoning Commission of Noank Fire District*, 185 Conn. 294, 310, 448 A.2d 940 (1981). What will "adversely affect" traffic is a vague and imprecise concept susceptible of several interpretations. The plaintiff claims that the only reasonable construction of the regulation is that the application cannot be denied based on it unless a specially permitted use generates traffic which will have a greater adverse impact than permitted uses in the zone, and the traffic generated by the site will endanger public safety. "The designation of a particular use of property as a permitted use establishes a conclusive presumption that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district." *Beit Havurah v. Zoning Board of Appeals of Norfolk*, supra, 177 Conn. at 443. Some of the permitted uses in a residential zone, such as a community recreation facility, public park and public playground, may generate as much concentrated traffic as a church and with the same potential effect. The effect of permitted uses upon adjacent roadways, while not controlling, provides some guidelines as to traffic volume and concentration required to adversely affect traffic in the vicinity of the site.

In the final analysis, despite the conflicting evidence and uncertainty as to the meaning of the regulation, the

Commission voted down the application by only a four to three vote. In addition, it had previously approved virtually the same application in 1988, although that approval was appealed and reversed on a procedural ground (Mark C. Hehl, et al. v. Bethel Planning & Zoning Commission, CV88-0295893S, appeal sustained for receipt of evidence after the public hearing).

4. Right of zoning authority to deny application which was previously approved.

There is a well established concept in the administrative law of this state which prohibits an administrative agency from reversing its prior decision unless the facts and circumstances which resulted in the decision have sufficiently changed to materially affect the reason which produced and supported the decision and no vested rights have intervened. *Laurel Beach Assn. v. Zoning Board of Appeals of Milford*, 166 Conn. 385, 387, 349 A.2d 834 (1974); *Hoffman v. Kelly*, 138 Conn. 614, 616-17, 88 A.2d 382 (1952); *St. Patrick's Church Corporation v. Daniels*, 113 Conn. 132, 139, 140, 154 A.343 (1931); *Root v. Zoning Board of Appeals of Madison*, 41 Conn. Sup. 218, 220-21, 565 A.2d 14 (1989); *Carlson v. Fisher*, 18 Conn. App. 488, 497, 558 A.2d 1029 (1989).

An administrative agency which has acted on a special permit application is not allowed to reverse itself unless a change of circumstances intervenes which materially affects the merits of the case, except that it can grant a second application which has been substantially changed to meet the objections the agency had to the original application. *Rocchi v. Zoning Board of Appeals of*

Glastonbury, 157 Conn. 106, 111, 248 A.2d 922 (1968); *Mitchell Land Co. v. Planning & Zoning Board of Appeals of Greenwich*, 140 Conn. 527, 534-35, 102 A.2d 316 (1953). The decisions on this concept have involved disapproval of an initial application and submission of a second one which is then approved, but it should also apply where an initial approval which is not implemented is then taken away on a second application.

There is no evidence of changed conditions from the time of the prior approval. While the opponents retained a traffic engineer to oppose the application, his report primarily relied upon the data of the proponent's traffic expert from both the 1988 and 1990 applications, even though the two experts reached different conclusions. For material changes to exist since the prior application, there should be some evidence of changed conditions in the immediate vicinity of the subject property connected with the reason for disapproval of the second application. See *Burr v. Rago*, 120 Conn. 287, 293, 180 A. 444 (1935). There is no evidence of changed traffic conditions in the area between July, 1988 and October, 1990 or any other land development activities which would significantly increase the traffic volume or cause traffic congestion on the roads near the project. In addition, while there may be some question or debate over traffic conditions, the commission did not clearly make a mistake by its July, 1988 approval of the project. The Town officials and agencies to which the applications were referred had no significant problems with either application. Absent factual findings by the Commission as to how the application was different from the previous one, it should not have

denied the special permit. See *Anastasi v. Zoning Commission of Bristol*, 163 Conn. 187, 189, 190, 302 A.2d 258 (1972). This is particularly true where the applicant was willing to consider reasonable controls and improvements to prevent traffic problems. While all of the considerations previously discussed show that the one reason assigned by the Commission for denying the application was inadequate and that it abused its discretion in denying the special permit, this case presents another critical factor which requires reversal of the decision and approval of the special permit.

5. Constitutional limitations on applying zoning regulations to churches.

The plaintiff contends in both this case and the declaratory judgment action that special standards apply here because the right to the free exercise of religion is involved, that the zoning regulations are unconstitutional and violate several provisions of the U.S. and Connecticut Constitutions. The right to raise such claims in a land use appeal is limited. As the defendant claims, Connecticut adheres to a rule that a party who makes an application under a zoning or other land use ordinance is precluded in the same proceeding from raising the question of its constitutionality. *Bierman v. Planning & Zoning Commission of Westport*, 185 Conn. 135, 139, 448 A.2d 882 (1981); *J & M Realty Co. v. Norwalk*, 156 Conn. 185, 191, 239 A.2d 534 (1968); *St. John's Roman Catholic Church Corporation v. Darien* , 149 Conn. 712, 717, 184 A.2d 42 (1962). Constitutional

questions can be raised in a separate declaratory judgment proceeding. *Bierman v. Planning & Zoning Commission of Westport*, supra, 185 Conn. at 140; *St. John's Roman Catholic Church Corporation v. Darien*, supra; *Cioffoletti v. Planning & Zoning Commission of Ridgefield*, 209 Conn. 544, 563, 552 A.2d 796 (1989). This prevents a broad constitutional attack on the Bethel Zoning Regulations in this appeal, even though churches are not a permitted use in any zone in the town. However, there is an exception to this rule which allows an unsuccessful applicant to raise constitutionality of a regulation in an administrative appeal as applied only to its own property under the facts of the case. *Bierman v. Planning & Zoning Commission of Westport*, supra, 185 Conn. at 140; *J & M Realty Co. v. Norwalk*, supra, 156 Conn. at 191 n.; *DeForest & Hochkiss Co. v. Planning & Zoning Commission of Madison*, 152 Conn. 262, 269, 205 A.2d 774 (1964).

Several cases in this state have considered the application of zoning regulations to churches. In *West Hartford Methodist Church v. Zoning Board of Appeals of West Hartford*, 143 Conn. 263, 121 A.2d 640 (1956), it was held that a zoning board of appeals did not abuse its discretion by denying a special exception for a church in a residential zone where the proposed location would adversely affect the area because of an increase in traffic which would cause a substantial loss in value of nearby residential properties. The court noted, 143 Conn. at 266, that the plaintiff had withdrawn its claim that the provision of the zoning regulations which forbids the use of property within certain zones unless a special exception was

obtained from the board was unconstitutional, and limited the decision to whether the church met the regulations. In *St. John's Roman Catholic Church Corporation v. Darien*, supra, 149 Conn. at 720, it was recognized that even though churches may not be completely excluded from residential zones, they can be subject to reasonable regulation as to their location without violating the constitutional guarantee of freedom of religion. This is the majority rule. See Anderson, *American Law of Zoning*, Sec. 12.22. While not deciding the question here, both cases recognized that even if they cannot be wholly excluded from a town, churches and church schools may be subject to reasonable zoning regulations and require a special permit. In a subsequent case, *Beit Havurah v. Zoning Board of Appeals of Norfolk*, supra, the court took a broad view as to the type of activities that are allowed as accessory uses to a church. More recently, in *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, supra, 17 Conn. App. at 53, the Appellate Court upheld the trial court's reversal of the denial of a special exception (special permit) for construction of a convent and religious book store. While not deciding the case on constitutional grounds, the opinion recognizes that the free exercise of religion clauses under Article One, Sec. 3 of the Connecticut Constitution and the First Amendment of the United States Constitution require more protection for churches than other uses of property, and that zoning regulations should not be strictly enforced against religious uses. *Daughters of St. Paul, Inc. v. Zoning Board of Appeals* supra, 17 Conn. App. at 67, 68. However, none of the Connecticut cases resolve

to what extent the state and federal constitutional provisions preclude or limit zoning regulations on churches and church activities.

Cases from other states have held that it is illegal for a municipality to exclude churches in all zones, from all residential zones, to allow them in the municipality only with a special permit, or have held that there was no compelling reason to deny a special permit. *Congregational Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 456 (Mo. 1959) (exclusion from residential zones); *Englewood v. Apostolic Christian Church*, 146 Colo. 374, 362 P.2d 172 (1961) (church allowed only with special permit); *Islamic Center of Mississippi v. City of Starkville, Mississippi*, 840 F.2d 293 (5th Cir. 1988) (church allowed only with special permit in zone, even though permitted use in another residential zone); *Rogers v. Mayor & Aldermen of City of Atlanta*, 110 Ga. App. 114, 137 S.E.2d 668, 671 (1964) (church allowed only with special permit in residential zone); *Diocese of Rochester v. Planning Board of Town of Brighton*, 1 N.Y.2d 508, 136 N.E.2d 827, 834 (1956) (churches cannot be excluded from a residential district); *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 315 (1942) (church allowed in residential district only with special permit); *Congregation Committee, North Fort Worth Congregation of Jehovah's Witnesses v. City Council of Haltom City*, 287 S.W.2d 700 (Tex. Civ. App. 1956); *Mooney v. Orchard Lake*, 333 Mich. 389, 53 N.W. 2d 308 (1952); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wash. 2d 378, 312 P.2d 195 (1957) (special permit required for church in residential zone); *Church of Christ in Indianapolis v. Metropolitan Board of Zoning*

Appeals of Marion County, 175 Ind. App. 346, 371 N.E. 2d 1 331 (1978); *North Shore Unitarian Society v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S. 2d 803 (1951); *Barhi v. Deal Borough Commissioners*, 204 N.J. Super. 575, 499 A.2d 559 (1985); *Jehovah's Witnesses Assembly Hall v. Woolwich Township*, 220 N.J. Super. 381, 532 A.2d 276 (1987). See also *82 Am. Jur. 2d Zoning and Planning*, Sec. 154; *Anderson American Law of Zoning*, 3d Ed., Sec. 12.22; *Love Church v. City of Evanston*, 671 F. Supp. 515 (N.D. Ill., 1987), reversed on other grounds, 896 F.2d 1082 (7th Cir. 1990); Annotation, 74 A.L.R. 2d 377.

These cases are based on the concept that such zoning restrictions must yield to the right of freedom of religion protected by the First and Fourteenth Amendments to the U.S. Constitution and comparable provisions in state constitutions where the zoning regulations unreasonably hinder or restrict religious activities. Constitutional provisions do not prevent all governmental regulation of churches and religious organizations, and they may be subject to religiously neutral regulation for a secular governmental purpose under the police power, such as, fire inspection, building and zoning regulations. *St. John's Roman Catholic Church Corporation v. Darien*, supra, 149 Conn. at 720, 723; *Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S. Ct. 1526, 1532, 32 L. Ed. 2d 15 (1972); *Lemon v. Kurtzman*, 403 U.S. 602, 612-14, 91 S. Ct. 2105, 2111-12, 29 L. Ed. 2d 745 (1971); *Islamic Center of Mississippi v. City of Starkville, Mississippi*, supra, 299; *Church of Christ in Indianapolis v. Metropolitan Board of Zoning Appeals of Marion County*, supra, 371 N.E.2d at 1334. The First Amendment limits the enactment of any law "respecting an establishment of religion, or prohibiting the free exercise

thereof." Article First, Sec. 3 of the Connecticut Constitution has a comparable provision. Article First, Sec. 20 guarantees equal protection of the laws and provides that no person shall be discriminated against in the exercise of his or her rights because of religion. The effect of these provisions on the plaintiff's property and to what extent they override zoning regulations based upon the police power, is beyond the scope of and unnecessary to decide this appeal.

Article Seventh of the Connecticut Constitution does have a provision which more specifically bears on the issue involved here, the right to build a church building on property owned by a church or ecclesiastical society. Article Seventh provides in part that any religious society "may build and repair houses for public worship." Provisions of our state constitution may be construed to provide greater protection of rights than the United States Constitution gives. *Husti v. Zuckerman Property Enterprises, Ltd.*, 199 Conn. 575, 589, 508 A.2d 735 (1986). The provision in Article Seventh, giving religious societies the right to build churches, has not been construed in our cases including, *St. John's Roman Catholic Church Corporation v. Darien*, supra, 149 Conn. at 720, where it was indicated that churches and church schools may be subject to reasonable regulations through zoning regarding their location without violating the constitutional guarantee of freedom of religion. Since this is an administrative appeal, it is not the proper action to decide whether Article Seventh creates a paramount right of a church society to build a church building without regard to

reasonable restrictions in the municipality's zoning regulations or significant traffic safety and congestion problems caused by its construction. Moreover, the plaintiff has conceded that the constitutional provisions protecting freedom of religion do not give a church the absolute right of a religious organization to construct a church building wherever it wants and in disregard of reasonable land use regulations based on the police power.

Our Supreme Court in *Burns v. Barrett*, 212 Conn. 176, 187, 561 A.2d 1378 (1989), quoting *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 85 L. Ed. 104 (1941), stated that a restriction on use of highways to promote the public interest of everyone is not prevented by the attempted exercise of first amendment rights which in other circumstances would be entitled to protection. See also *Husti v. Zuckerman Property Enterprises, Ltd.*, supra; *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984). However, some increased traffic from construction of a church is not a sufficiently significant factor to warrant limitation of freedom of religion by denial of a special permit. *Family Christian Fellowship v. County of Winnebago*, 151 Ill. App. 616, 503 N.E. 2d 367 (1987); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, supra, 312 P.2d at 199; *Congregation v. City Council of Haltom City*, supra, 705; 82 Am. Jur. 2d 639, 640, *Zoning and Planning*, Sec. 154. In short, where there is a conflict between constitutional rights and land use regulations under the police power, the outcome depends upon the facts of each case. This type of problem frequently arises when land use regulations as applied to a specific property amount to an unconstitutional taking of it under the state and federal constitutions. See *Bartlett v.*

Zoning Commission of Old Lyme, 161 Conn. 24, 31, 282 A.2d 907 (1971). "[A] litigant may challenge the validity of a statute or ordinance under the Connecticut constitution only as it has been applied to him." *Husti v. Zuckerman Property Enterprises, Ltd.*, supra, 199 Conn. at 589. Under the facts of this case, the plaintiff church was entitled to a special permit on nonconstitutional grounds. However, even if those factors were insufficient to overturn the Commission's denial of the special permit, under the facts of this case and considering the specific and apparently unique language of Article Seventh of the Connecticut Constitution, denial of the special permit to build the church here would be illegal, and the provision in the zoning regulations would be unconstitutional as applied to the plaintiff's property.

6. Conclusion

Even though the Commission must grant a special permit to the church, it has the right to attach reasonable conditions necessary to protect the public health, safety, convenience and property values, as provided by Sec. 8-2 of the General Statutes. *Summ v. Zoning Commission of Ridgefield*, 150 Conn. 79, 91; 186 A.2d 160 (1962); *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, supra, 168 Conn. at 307. The Commission's authority to impose reasonable conditions is not a standard allowing it to tack on any condition it wants, but merely the conditions allowed by the statute and the regulations. Reasonable and necessary conditions within the control of the applicant to alleviate traffic congestion in the vicinity of the site can be attached to a special

permit. *Lurie v. Planning and Zoning Commission of Westport,* supra, 160 Conn. at 299, 307; Sec. 118-21I of the Bethel Zoning Regulations.

The appeal is sustained and remanded to the Commission for proceedings consistent with this decision. Section 8-8(1) of the Connecticut General Statutes.

/s/ Robert A. Fuller
Robert A. Fuller, Judge